166-717

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~771~~. 429 149

E. M. PATTON, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED AUGUST 4, 1894.

(15,655.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 18, 1894.

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1 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held pursuant to law on the third Monday of November, A. D. 1893, in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit; the Honorable James W. Locke, United States district judge for the southern district of Florida, and the Honorable Harry T. Toulmin, United States district judge for the southern district of Alabama.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, }
v. }
E. M. PATTON, Defendant. }

Be it remembered that heretofore, to wit, on the 25th day
2 of November, 1893, a transcript of the record of this cause, in the circuit court of the United States for the western district of Texas, was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit, in the words and figures following, to wit:

3 *Caption.*

Be it remembered that at a term of the circuit court of the United States circuit in the fifth circuit thereof and in and for the western district of Texas, at El Paso, begun and holden at El Paso, Texas, on the second day of October, 1893, and which term adjourned on the first day of November, 1893, the Honorable T. S. Maxey, United States district judge for the western district of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to wit:

Style of cause:

E. M. PATTON }
vs. } No. 173.
THE TEXAS & PACIFIC R'W'Y CO. }

Plaintiff's Original Petition.

In District Court, El Paso County, Texas.

E. M. PATTON }
vs. } No. —.
TEXAS & PACIFIC RAILWAY CO. }

To the honorable district court, El Paso county, Texas:

E. M. Patton, plaintiff, complaining of the Texas & Pacific Railway Company, defendant, respectfully states: That plaintiff is a resident of El Paso county, Texas, and the defendant is a corpora-

tion, duly incorporated, doing business in El Paso county, Texas,
and is now, and for several years has been engaged in the
4 business of a common carrier in said county, operating its
line of railway therein, and now has as its local agent, representing it in said county, E. Thornton, Jr., who is a resident of said county.

That heretofore, to wit, on the first day of December, 1892, plaintiff was in the employ of defendant as fireman on one of its locomotive engines; that at about 11.40 a. m. on said day he came in on regular run, and at about 2 o'clock p. m. on said day after dinner, he started back to do the work of filling up oil cans, lubricators and wiping off and cleaning locomotive engine No. 90, on which he was employed, which said work it was his duty to perform. That he found said engine standing at a coal car, in said company's car yard, in the city of El Paso, Texas, coaling up. That he got on said engine to do the work of cleaning up, etc. That shortly afterward said engine left the coal car and was run down toward the sand-house in said car yard. That when said engine was so run down toward said sand-house, he had finished the work mentioned except the filling up of oil cans. That he remained on the engine and rode down to said sand-house, about 300 yards. That he had a right to be on said engine at said time. That said engine was stopping gradually near said sand-house to have fire cleaned out. That as said engine was stopping, and while it was moving very slowly, plaintiff attempted to step off of said engine, so as to get out of the way of the fire-cleaner, who was about to enter upon said engine to clean out the fire. That the step leading from said engine and from the cab thereof was in a bad, defective, and improper condition, and was loose so that as plaintiff attempted to step from said engine, said step being in such bad condition, turned so that it threw plaintiff under said engine, and caused plaintiff to fall, so that his right leg was thrown under said engine, and said engine ran over his right leg, and it was
bruised and lacerated and his right foot was mashed, and it
5 became necessary to amputate his right leg at once, about
three inches above the ankle joint.

That in consequence of said injury his right leg was amputated at once about three inches above the ankle joint, and he remained confined to his room about two months and suffered great physical pain and mental anguish, and disquietude, and still suffers great physical pain and mental disquietude.

Plaintiff says that he was in no degree negligent in stepping from said engine while it was moving slowly, as hereinbefore stated, and that had said step, leading from said engine, and cab, been in a good, proper and safe condition, he could and would have sustained no injury whatever. That it was the duty of defendant at the time of said injury to have had and kept said step in a good, proper and safe condition, and that in consequence of the negligence and carelessness of defendant in not keeping said step, and in not having same at said time in a good, safe and proper condition, but in having it and allowing it to be, at said time in a bad, defective and loose condition, he sustained the injuries hereinbefore mentioned.

That at said time defendant knew or ought to have known, and could have known by the exercise of reasonable diligence, that said step was in such bad, loose and defective condition, and plaintiff did not know and was not chargeable with notice that said step was in such condition.

Plaintiff states that at the time of said accident he was between 33 and 34 years of age. That prior to said accident he was a strong, able-bodied and vigorous man and his services were reasonably worth, and could have made $85 per month, but in consequence of such injuries he is now a cripple for life, and has been damaged by such injuries in the sum of $20,000. Plaintiff prays that defendant be cited to answer this petition, and prays
6 that upon final hearing he have judgment for his damages and costs.

MILLARD PATTERSON,
Attorney for Plaintiff.

Indorsed: No. 1766. In district court, El Paso county, Texas. E. M. Patton *vs.* The Texas & Pacific Railway Company. Plaintiff's original petition. Filed this 17th day of March, A. D. 1893. J. A. Escajeda, clerk district court, El Paso county, Texas.

Petition for Removal.

In the District Court of El Paso County, Texas, 34th Judicial District.

E. M. PATTON
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 1766.

The petition of the Texas and Pacific Railway Company respectfully shows to the court:

First. That the Texas and Pacific Railway Company was, and is, a corporation, duly organized and existing under, and by virtue of the laws of the United States, to wit: "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas and Pacific Railroad Company, was changed to the "Texas and Pacific Railway Company."

Second. That the above-entitled action was commenced in the above-named court on the 17th day of March, 1893, and citation issuing therein was served on this defendant on the 18th day of March, 1893, which said citation is returnable on the first Monday in April, 1893, it being the 3rd day of April, 1893, and this defendant is not, and will not be required by the laws of the State
7 of Texas, or the rule of this court, to answer or plead to the petition of the plaintiff before the 4th day of April, 1893.

Third. That the matter in dispute in this case exceeds exclusive

of interest and costs, the sum or value of two thousand dollars, and this suit arises under the laws of the United States, as hereinbefore, and hereinafter more fully set forth; that this action was brought by the plaintiff against your petitioner, The Texas and Pacific Railway Company, to recover damages in the sum of $20,000 for injuries alleged to have been received while in the employ of said company, in the capacity of fireman on account of defective step to an engine, being operated by the said company, which injuries the plaintiff alleges caused him to lose his leg by the negligence of said company, as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action.

That this suit against this defendant is a suit arising under the laws of the United States; and more especially under the laws of the United States constituting the charter of this defendant, and under which it is corporated, that is to say, the said act of Congress of the United States approved March 3, 1871, entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road and for other purposes and acts amendatory, on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth. That the above-entitled action is a civil suit arising under the laws of the United States, of which the circuit court of the *circuit court of the* United States for the western district of Texas, is given original jurisdiction by an act of Congress, approved March 3, 1887, to wit: An act entitled "An act to amend the act of Congress approved March 3, 1875, entitled 'An act to determine the jurisdiction of circuit courts of the United States, and to regu-
8 late the removal of causes from State courts, and for other purposes, and the acts of Congress approved August 13, 188–, entitled 'An act to correct the enrollment of an act approved March 3, 1887, entitled 'An act to amend sections 1, 2, 3 and 10 of an act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts and for other purposes, approved March 3, 1875.'"

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the circuit court of the United States for the western district of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court, if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said court to accept said petition and bond, and to remove this cause to the circuit court of the United States for the western district of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY CO.,
By EDWARDS & NEILL, *Attorneys.*

THE STATE OF TEXAS, }
County of El Paso. }

B. F. Darbyshire being duly sworn, says that he is the agent of the Texas & Pacific Railway Company, being the general agent of said company, that the said, The Texas & Pacific Railway Company, is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts therein stated are true.

B. F. BARBYSHIRE.

Sworn and subscribed before me, this 1st day of April, 1893.

[SEAL.] J. C. LACKLAND,
Notary Public, El Paso Co., Texas.

9 Endorsed: No. 1766. E. M. Patton *vs.* The Texas & Pacific Railway Co. Petition for removal. Filed the 1st day of April, A. D. 1893. J. A. Escajeda, clerk district court, El Paso county, Texas, by M. L. Barlow, deputy.

Bond for Removal.

In the District Court of El Paso Co., Texas, 34th Judicial District.

E. M. PATTON
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 1766.

Know all men, by these presents: That The Texas & Pacific Railway Co., as principal, and C. R. Morehead and J. C. Lackland as sureties, are held and firmly bound unto E. M. Patton, in the penal sum of $500, for the payment whereof, well and truly to be made, unto the said E. M. Patton, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that:

Whereas, the said Texas & Pacific Railway Co. has filed its petition in the district court of El Paso county, for the removal of a certain cause therein pending, wherein E. M. Patton is plaintiff and The Texas & Pacific Railway — is defendant, said cause being numbered upon the docket of said court as No. 1766, to the circuit court of the United States, for the western district of Texas.

Now, therefore, if the said Texas & Pacific Railway Co. shall enter in said circuit court of the United States for the western district of Texas, a copy of the record in said suit on the first day of next session thereof, and shall pay all costs which may be awarded by said circuit court of the United States, if said court shall hold that
10 said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the

same was originally requisite in said cause, then this obligation shall be void, otherwise in full force and effect.

Witness our hands and seal, this 1st day of April, 1893.

THE TEXAS & PACIFIC RAILWAY CO.,
By EDWARDS & NEILL, *Attorneys.*
C. R. MOREHEAD.
J. C. LACKLAND.

Approved, this 3d day of April, 1893.

C. N. BUCKLER,
Judge District Court, 34th Judicial District.

Endorsed: No. 1766. E. M. Patton *vs.* The Texas & Pacific Railway Co. Bond for removal. Filed the 1st day of April, A. D. 1893. J. A. Escajeda, clerk district court, El Paso county, Texas, by M. L. Barlow, deputy.

Order of Removal.

E. M. PATTON *vs.* TEXAS & PACIFIC R'Y CO. } No. 1766.

This cause, coming on this day to be heard, upon the petition of the Texas & Pacific Railway Co., to remove same to the circuit court of the United States, for the western district of Texas, said petition being heard by the court, and it appearing to the court that a good and sufficient bond has been filed, and that said petition shows proper grounds for removal, the prayer of the said Texas & Pacific Railway Co. is granted and its bond approved, and this cause ordered removed to the circuit court of the United States for the western district of Texas, and the clerk of this court will
11 make out a transcript of the record in this cause, to be filed in the United States court for this said district of Texas.

STATE OF TEXAS, }
County of El Paso. }

I, J. A. Escajeda, clerk of the district court, in and for El Paso county, State of Texas, do hereby certify that the foregoing thirteen pages contain a full, true and correct copy and transcript of all papers filed and proceedings had in the district court of El Paso county, Texas, in the case of E. M. Patton *vs.* The Texas & Pacific Railway Co., numbered 1766, on the docket of said court.

In testimony whereof witness my hand and seal of the district court, at office in El Paso, Texas, this 1st day of May, A. D. 1893.

(Signed) J. A. ESCAJEDA,
Clerk District Court of El Paso County, Texas,
(Signed) By M. L. BARLOW, *Deputy.*

Endorsed: No. 173. Removed from El Paso county. E. M. Patton *vs.* Texas & Pacific Railway Co. Record from El Paso county district court. Filed May 1st, 1893. B. G. Duval, clerk. (Signed.) By Warner A. Gibbs, deputy.

First Amended Original Answer by Defendant.

In the U. S. Circuit Court, Western District of Texas, at El Paso.

E. M. PATTON
vs.
TEXAS & PACIFIC R'Y CO.

Now comes the defendant, and having obtained leave of the court, files this its first original answer amending its answer filed September 30, 1893, and so amending says:

First. That the matters and things set forth in the plain-
12 tiff's petition were not sufficient in law to entitle him to have and maintain his action against this defendant, and of this prays judgment of the court, and for special exception defendant shows that plaintiff's petition does not allege that it was his duty to be on the engine where and when he alleges he was injured, or show any reason why he was properly on, or had a right to be on or about said engine at said time, and prays judgment.

Second. For answer herein, saving its demurrer, defendant denies all and singular the allegations in plaintiff's petition contained, and says that it is not guilty of the wrongs, injuries and trespasses therein complained of, and of this it puts itself upon the country.

Third. And for further answer herein defendant admits that plaintiff was a fireman upon one of the defendant's engines, as stated in his petition, and that at the times stated in the petition plaintiff's duty was to act as fireman on defendant's engine No. 90, which engine was engaged in hauling passenger trains over defendant's road from El Paso to Toyah and from Toyah to El Paso. That on the day when plaintiff claims he was injured, acting in his capacity as such fireman, he was employed by defendant on the said engine from Toyah to the city of El Paso, pulling a passenger train, and arrived in El Paso about 10.30 a. m. on said day, and a few minute afterwards left said engine at defendant's depot in said city of El Paso; that it is true that it is part of plaintiff's duty as fireman to have his cans properly filled with oil and a portion of his engine wiped off and clean before said engine should proceed on its next trip from El Paso to Toyah, but that duty the plaintiff was not required or expected to perform until after the engine had been inspected and repaired and placed in the round-house at El Paso. That it would
13 have been plaintiff's duty to have gone out on said engine on the next day, December 2d, at 2.30 p. m., and ample time and opportunity would have been given him after the said engine had been placed in the round-house and repaired to have performed his duty in relation to the same. That when the engine arrived at El Paso on said day as above stated, and plaintiff left the same at the depot, and no longer had any business or connection with said engine until after the same was inspected and repaired. Said engine was taken charge of by the yardsmen, whose duty it was to take it into the yards and coal it, sand it, repair it and place

it in the round-house, where the proper servants of the company would clean all that portion of it which was not the duty of the plaintiff to clean, and to leave the same in the round-house where plaintiff could clean such parts of it as he was required to clean, and arrange the cans, lubricators and other apparatus which he would need on his next outgoing trip. That the plaintiff without authority, or in the time of his duty voluntarily got upon said engine while the same was in the charge of the yardsmen, and before the same had been repaired or placed in the round-house, and negligently tried to get off of said engine while it was in motion, and thereby directly by his negligence contributed to the injuries that he received; wherefore defendant prays that plaintiff should not recover, and of this it puts itself upon this country.

Fourth. The plaintiff for further plea herein, states that No. 90 was provided with suitable and proper apparatus to be used as steps to said engine, and that defendant employed suitable and competent inspectors whose duty it was to inspect the same, and who did inspect it, and suitable and competent mechanics whose duty it was to repair said engine, and who did repair it when necessary, and that said engine was carefully inspected, but inspection failed
14 to discover the defect, if any there was in said step, and further that the plaintiff had full opportunity and knowledge of said machinery and apparatus and full opportunity to know whether or not said step was in safe condition, and that if the same was unsafe it became so without fault or negligence on the part of this defendant, and under the circumstances surrounding the plaintiff which gave him equal knowledge of such defect, if any, with the defendant, and that therefore plaintiff should not recover.

For further answer herein defendant says that if the plaintiff received injuries, as set forth in his petition, and such injuries were caused by any negligence on the part of the employés of defendant that such employés were fellow-servants with the plaintiff, and that plaintiff is not entitled to recover of this defendant for such negligence, and of this it puts itself upon the country.

EDWARDS & EDWARDS,
Attorneys for Defendant.

Endorsed: No. 173. In circuit court of the U. S., W. D. of Texas. E. M. Patton *vs.* Tex. & Pac. R'y Co. First amended original answer of defendant. Filed Oct. 6, 1893. (Signed) D. H. Hart.

Judgment.

In U. S. Circuit Court, W. D. T., at El Paso, Texas.

E. M. Patton
vs.
Texas & Pacific Railway Co. } No. 173.

On the 9th day of October, 1893, the above styled and numbered cause came on for trial. Both parties appeared by their attorneys, and announced themselves ready for trial. The matters of fact in

issue were submitted to a jury composed of Wm. Hamilton,
15 and eleven others all duly empanelled, qualified and sworn.

The trial not being ended on the ninth day of October, 1893, the court adjourned until this the 10th day of October, 1893, and the trial was resumed, and on this 10th day of October, 1893, the jury after hearing the evidence, the arguments of counsel and the law, as given to them in the charge of the court, retired to consider of their verdict, and afterward on this day returned into open court the following verdict:

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

We the jury find for the plaintiff, and assess his damages at nine thousand ($9,000) dollars.

WM. HAMILTON, *Foreman.*

It is therefore ordered, adjudged and decreed by the court, that the plaintiff E. M. Patton, do have and recover of and from The Texas & Pacific Railway Company, defendant, said sum of nine thousand dollars ($9,000), and interest on the same from this 10th day of October, 1892, at 6 per cent. per an-um, and further that plaintiff do have and recover of defendant all costs by him in this behalf expended, for all of which he may have his execution.

Motion for New Trial.

In the Circuit Court of the U. S. at El Paso, October Term, 1893.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 173.

Now comes the defendant by its attorney and moves the court to set aside the verdict of the jury and grant it a new trial in this cause, because:

16 First. The court erred in refusing the special charge asked by the defendant.

Second. The verdict of the jury is contrary to and not supported by the evidence.

Third. The verdict of the jury is contrary to the law as given in charge by the court.

Fourth. The verdict is grossly excessive and unreasonable and is not warranted or sustained by the evidence.

EDWARDS & EDWARDS,
Attorneys for Defendant.

Indorsed: No. 173. E. M. Patton *vs.* Texas and Pacific Railway mpany. Motion for new trial. Filed October 12, 1893. D. H. art, clerk.

U. S. Circuit Court Minutes.

October term, 1893. Thursday, the 19th day of October, 1893.

Court met pursuant to adjournment at 9 a. m, all officers thereof present; whereupon the following proceedings were had, to wit:

Motion for a New Trial Overruled.

E. M. PATTON
vs.
THE TEXAS & PACIFIC RAILWAY CO.

On this day comes the defendant by its counsel and moves the court to grant a new trial in this cause, for reasons assigned in said motion, which motion on behalf of the defendant having been heard and duly considered by the court, it is ordered that same be in all things overruled.

17 *Order Allowing Defendant 15 Days to File Bill of Exceptions.*

In the United States Circuit Court for the Western District of Texas, at El Paso, October 14th, 1893.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

The defendant, The Texas & Pacific Railway Company having asked for 15 days' time from the rendition of the judgment in this case on October 10th, 1893, in which to prepare and to have filed their bill of exceptions in order that said ruling may be revised upon a writ of error. It is ordered that said defendant have and it is hereby allowed 15 days in which to prepare and file said bill of exceptions.

Order Allowing 10 Days' Further Time to File Bill of Exceptions.

In the Circuit Court for the Western District of Texas, October 25, 1893.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } 173.

For good cause shown upon the application of the defendant for further time in which to prepare, submit and perfect its bill of exceptions, it is granted, and it is ordered by the court that defendant be allowed the further time of 10 days from this date within which time to prepare, submit and file its bill of exceptions herein.

18 *Defendant's Bill of Exceptions.*

In the U. S. Circuit Court for the Western District of Texas, El Paso Division.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 173.

Be it remembered that on the trial of the above cause the following facts being established by the testimony introduced, to wit:

The plaintiff, E. M. Patton, was in the employ of the defendant as fireman on a passenger engine at the time, and for some time before the accident heretofore described, his regular work was as a fireman of engine No. 90, which hauls a passenger train from the city of El Paso to Toyah, Texas, a distance of 196 miles, leaving El Paso at about 2.30 p. m., and arriving at Toyah about 11.30 p. m., and remain in Toyah the balance of the night and all the next day until about 2 a. m., the morning of the second day, when the engine would return from Toyah to El Paso hauling a passenger *engine*, arriving in El Paso about 10.30 a. m., on the same day, and again leaving El Paso for Toyah at 2.30 p. m., the next day. The engineer who ran said engine was named A. Steiner.

Second. That it was the duty of the fireman of passenger engines in the employ of defendant to keep the cab of the engine clean, and to clean all that portion of the engine above the running board; a board extending from one side of the engine to the center of the boiler, and to keep the oil cans and lubricators filled with oil, and to generally obey orders of the engineer when the train was running.

19 Third. That the defendant had at El Paso a round-house and repairing shops and a machinist to inspect and repair the engines, and also had at Toyah a round-house and a machinist to inspect and repair its engines, and that engines coming into each place were inspected and repaired before going out again.

Fourth. When defendant's passenger engines arrived at El Paso, including the engine on which plaintiff worked, the engineer and fireman would get off and leave the engine attached to the train at the depot, and that the engine would then be taken charge of by the yardsmen, and employé called the "hostler" would detach the engine from the train and take the same down into the yard to coal it, sand it, and do such other things as were necessary, except repairing it, and then place the same in the round-house where it would be cleaned by the servants other than the fireman in all its parts beneath the running board, and inspected by the machinist and repaired, and that the fireman would have ample time after the engine had been placed in the round-house to clean out the cab, wipe off his part of the engine, fill his oil cans and lubricators, then the engine would be taken from the round-house and attached to the train by the yardsman or hostler, where the fireman and

engineer would get on the train again to begin their trip, and plaintiff knew all this.

Fifth. There was no rule of the company that prohibited the fireman from getting upon the engine for the purpose of filling his oil cans, etc., before it was placed in the round-house, nor was there any rule that specified a particular time when he should do this work, the only rule being that he was to have his engine in proper condition to go out when its turn came. There was a rule of the company that the engineer and fireman of a passenger train should not be called for duty within after they had come in on a trip.

20 That the fireman could select any time that was most convenient for him to clean the cab, fill the oil cans, etc., and that while the engine was hot and the oil warm it was more convenient and could be done in less time than to wait until the engine was cooled off.

Sixth. That passenger engine No. 90 has two steps on the right side; one of these steps is a loop fastened under the tender, and a person getting off the engine backwards would have this step on the left; the other step which would be on his right was attached to the rear part of the engine, and it is this latter step that the proof shows was loose. The gangway of the engine is where the tender and engine come together and there is an opening on each side of the engine; that these steps were used to get on and off the engine; the step which is claimed in this case to be defective is the step which is attached to the engine. This step consists of a shovel-shaped piece of iron standing directly out from the engine firmly fixed to a rod of iron about an inch in diameter, and about eighteen inches long which rod passes up through the iron casting at rear of engine, about six or eight inches thick; a shoulder to this rod fits underneath the casting, and the part passing through above has threads on the upper end upon which the nut is screwed firmly down on the casting, fastening the rod in the casting so that it will not move. This nut is about two inches square and the thread on the rod extends 5 or 6 inches, thus making the rod extend above the nut, when the nut is properly screwed down, and covering this extension above the nut is a tubular piece of brass arranged for ornament which sets upon the nut and hides from view that portion of the nut immediately around the threads of the step bar. The step affixed to this bar is about twelve or fourteen inches above the track, and the one affixed to the tender is about six inches higher.

21 Seventh. On the 29th of November it was necessary to put a spring on the right side of the engine, and in order to do this, this step had to be removed in order to place a jackscrew under the rear of the engine, and in doing this the rod holding the step was taken out of the casting by unscrewing the nut described in paragraph 6, and the step was replaced on that morning at El Paso, before the engine started on its run to Toyah. In replacing the step the plaintiff himself assisted the machinist of defendant at El Paso, Rossiter, in tightening up said nut, and said day the

engine left El Paso, taking out a passenger train at the usual hour, 2.30 p. m., and made the run to Toyah. The machinist and plaintiff testified that the nut was properly screwed on at El Paso, and would not have become loose in a trip from El Paso to Toyah and return.

Eighth. That at Toyah some repairs were made to the engine. Alex. Mitchell, who was foreman of the shops and yards at Toyah, undertook to make the repairs himself; that he had a couple of Chinamen assistants who placed two jackscrews, one on each side of the front of the engine, and elevated the front. Then the Chinamen brought another jackscrew and put it down at the rear of the engine near to this step above described on the right side of engine; that to put the latter jackscrews in place to elevate the rear of the engine it was necessary to remove this step. Plaintiff testified he saw a jackscrew on the ground near this step. Alex. Mitchell, the foreman for defendant, testified that he told the Chinaman to get the jackscrews, and under his direction they placed two jackscrews one on each side of the front of the engine, but without any instructions from him they brought and put another jackscrew on the ground near the step; that he was out of the round-house five or ten minutes while the Chinamen were there, and that
22 this jackscrew *and that this jackscrew* near the step was not placed under the engine in position to elevate it, and that the step was not moved for the purpose of putting the jackscrews there, and that the nut on the step was not moved while the engine was at Toyah on that trip; that Mr. Young was the machinist at Toyah at that time, and that this was Sunday, the 30th of November, 1892, and he, Mitchel, believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot and finding that he could not accomplish the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cow-catcher; that the report of the engineer in the book at Toyah provided for that purpose, reporting that repairs were necessary on his engine on the 29th day of November, 1892, "was change water, grind in blower, put gasket in front joint of blower pipe, raise the pilot."

That "change water," means to let the water that engine came in on out, and put fresh water in. "Grind in blower" is to arrange blower so that the smoke will pass out at the stack, instead of coming out at the cab. Witness did this which is a very small job. "Put gasket in front joint of blower pipe" was a very light job, and was done by witness.

That to "raise the pilot," required witness to jack up the engine, and put gibs under the spring ends of the engine truck; the engine truck is near the front end of the engine; did not do this because it was a pretty big job, and he was doing the work by himself, with only the help of two Chinamen, and that the engine was all right to run as well as if it had been done, except the pilot was a little low, but it did not interfere with the safe running of the engine.

23 Ninth. The engine left Toyah at the usual hour of two a. m., on the morning of the first of December, 1892, and arrived at the usual hour at El Paso, 10.30 a. m., and plaintiff and engineer got off the engine several times while it was standing, on the right side, and neither of them noticed anything the matter with the step. After they arrived in El Paso, they both left the engine attached to the train at the depot, getting off the engine on this right side, using this step, and went to their homes, and neither noticed anything wrong with the step.

Tenth. A short time after the engine arrived in El Paso, the "hostler," or a man whose duty it is to take it, coal it, etc., and put it in the round-house, took charge of it, detached it from train, ran it into the yard, and set it on a transfer track, and left it there an hour or so, then took it to the coal cars, and left it there for the coal-heavers to coal up, and it remained there an hour or more. The coal is placed in the tender back of the engine, and piled up pretty high, and some of the pieces are a foot or eighteen inches long, and six or eight inches wide, and very heavy, and one of them falling off the gangway might strike the step. When the hostler went later to get the engine from the coal yards, the plaintiff was on the engine; the hostler ran the engine from where it was coaled, and was moving it to the proper position near the sand-house to have the fire cleaned out; it was something near an hour from the time the hostler started to leave the coal yards before he got to the sand-house as he was detained by switches being closed. The plaintiff was on the engine during this time cleaning up and filling his cans and lubricators, and as the engine was nearing the place where the fire would be cleaned out; and two firemen cleaners were on the engine also, one of them in the gangway and the other on the front of the engine; the engine was backing and the fire-
24 cleaner on the engine was in the act of showing the hostler, by making a signal where to stop the engine and to clean out the fire.

The engine at this time was moving very slowly, not more than three or four miles an hour, and the plaintiff had gotten of- the gangway and was standing on the steps with his face to the engine, and his left foot on the tender, and his right foot on the step, which is heretofore described as attached by a rod to the rear of the engine, and the plaintiff desiring to get out of the way of the fire-cleaners as the engine passed the sand-house, and for the purpose of stopping there, and waiting until the fire was cleaned out, stepped off the engine in a careful and proper manner, that is detaching his left hand and foot, and stepping down with his left foot which was in the direction the engine was backing, the pressure of his right foot turned the rod to which the step was attached in such a manner as to throw the step around close to the rear driving wheel of the engine and plaintiff's right foot slipped off the step, so that his right foot fell immediately under the driving wheel, and the engine continued to back, the wheel ran over a portion of his foot and crushed it so that amputation became necessary.

Eleventh. Plaintiff knew that there were servants and employés

of the defendant for the purpose of inspecting and repairing his engine, and that the opportunity given to do this was when the engine was placed in the round-house at El Paso, and that at the time he fell and was injured the engine was not yet placed in the round-house where it would be inspected and repaired.

Twelfth. The cause of the turning of the step when plaintiff fell was on account of the nut heretofore described on the top of the casting not being taut, but it had become loose leaving the
25 rod to which the step was attached so it could be easily turned.

It was the duty of the engineer who operates an engine to inspect and report all defect in repairs necessary on his engine, in a book kept for that purpose at each place, at the end of his run, in this instance at El Paso and at Toyah, and on the day that the plaintiff was injured, the engineer entered the following report at El Paso a few minutes after they arrived, "pilot raising and wash out engine," that is the pilot needed raising and the engine should be washed out, and he did not discover or report that the said step was loose, if it was loose at the time.

13th. The defendant had proper and competent inspectors to inspect and repair engines in the yards at El Paso and Toyah in addition to the inspections made by the engineers, and that at the time plaintiff was hurt, the yard inspectors and mechanics had had no opportunity under the routine and custom as to handling, coaling, sanding, cleaning, inspecting and repairing engines as they arrived in the yards, to inspect or repair the engine upon which he was injured, and this plaintiff well knew.

14th. Plaintiff's business in November and December, 1892, was fireman of a locomotive engine, and had been engaged in said business about seven years, and was earning from eighty to eighty-four dollars a month. He was thirty-four years of age, and would probably live thirty-two years longer; was in good health at time of accident, and had not missed a day's work for two or three years, and on account of losing his leg by being run over by defendant's engine he was not in a condition to follow his business any more; and that he has suffered a great deal of physical pain from the injury and was confined to his room for something like two months, and was attended by a skillful physician and surgeon furnished by defendant.

26 15th. Plaintiff did not know that said step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured; that the manner in which the plaintiff got off the engine backwards was a careful and prudent manner, and that he alighted in a careful and prudent manner and the usual manner to alight from an engine whether in motion or standing still, and that if said step had been in repair there was no danger in the manner in which plaintiff alighted from the engine.

16th. Plaintiff testified that it was the custom of the firemen to go on their engines in the yard before they were put in the round-house, and do their work of cleaning such part of the engine as it was their duty to clean, and cleaning out and filling the lubricators

and filling the oil cans, but on being asked he could not mention the name of any other fireman employed on defendant's passenger engines who did this besides himself. He stated that his reason for doing this work on the engine at that time, was that the weather was getting cool and he had to strain his oil, and he would set his cans out in the gangway near the engine so that the warmth would make it easier and quicker work to handle the oil properly, whereas, if he had waited until the engine was in the round-house the oil would have been somewhat chilled and more difficult to handle, and that for some time previous he had been going on the engine and doing this work while the engine was in the yard, and before it had been placed in the round-house.

17th. Mr. Wheeler, who is sup't of terminal and foreman of the shops in El Paso for defendant, the hostler Taylor, and the machinist Rositer, employés in the defendant's yard and shops in El Paso, testified that plaintiff was the only fireman of a passenger engine that went upon his engine in the yard in El Paso to do his work before his engine had been placed in the round-house,
27 and that they had known him to do so three or four times before the accident.

18th. All the witnesses except the witness A. C. Wheeler, supt. and foreman of defendant, testified that the nut above described used to tighten the step would not probably work loose in making the trip from El Paso to Toyah and back by the ordinary jar and running of the engine, that it might come loose by the step having struck against something.

Wheeler testified that he was a competent machinist, having had experience of twenty years with engines: that the nut might work loose on said trip but it was impossible to tell whether it would or not. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return. It was proven that the nut and threads of the step-rod were in good condition, and had not worked loose since the accident to plaintiff.

19th. The above and foregoing being a statement of all the facts in evidence of defendant, before the jury retired, under the charge of the court, requested the court to give the jury the following instructions:

"If plaintiff was a fireman upon one of the defendant's engines, pulling passenger trains over the track into El Paso, where defendant had repair shops, and competent persons to repair its engines, and plaintiff knew of this, and on the day that he was injured the engine on which he was employed as fireman arrived in El Paso apparently in good condition, and the plaintiff left said engine, and it was taken in charge of by servants of the defendant whose duty it was to inspect and repair it, and he knew he would have ample time afforded him after the same was inspected and repaired to perform his duties on said engine in cleaning the same and have the appliances and implements pertaining to said engine in his
28 immediate charge in proper condition for his outgoing trip on said engine, it was his duty to give servants of defendant opportunity to inspect and repair the engine and appliances before

going on said engine while it was in motion, and if he did not do this, but went on said engine knowing that the same had not yet been inspected and repaired, for the purpose of performing his duties in cleaning and putting in proper condition the lubricators, oil cans and other apparatus which it was his duty to clean and repair, and in doing so attempted to alight from said engine while it was in motion, when such alighting was not necessary, in the performance of such duties and the step of the engine was in such defective condition that it was unsafe for use in getting off the engine while in motion, and in so alighting he was injured by reason of such unsafe step, he would be guility of contributory negligence, and not entitled to recover any damages from defendant, even if in alighting he did so in such a careful manner as a prudent man would exercise if the step were safe."

These special instructions the court refused, and the defendant then and there excepted before the jury retired to the action of the court upon the same, at the time of the refusal thereof, and this bill of exceptions was tendered, allowed, signed and sealed by the court, and thereupon the court charged the jury as follows:

"The plaintiff brings suit against the defendant to recover damages for personal injuries, claiming briefly and in effect, that while engaged in the services of the defendant and in the performance of his usual and ordinary duties as fireman on passenger engine No. 90, he was seriously injured because of the negligence of defendant in failing to keep the step of the engine in suitable condition, and proper repair for use by its employees. Recovery is sought by plaintiff on the ground of alleged negligence on the part of defendant, and, to entitle him to recover, such negligence must be proved as alleged.

29 "The general principle of law, touching the duties of individuals and corporations in supplying machinery or mechanical appliances for their employés, are thus stated by the Supreme Court: 'Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employé or master fails in his duty of precaution and care, he is responsible for any injury which may happen through defect of machinery, which was, or ought to have been known to him, and was unknown to the employé or servant. But if the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And further, if the employé himself has been wanting in such reasonable care and prudence as would have prevented

the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of machinery, through the negligence of the employer.' Railroad Co. *vs.* McDade, 135 U. S., p. 570.

"It is only the duty of a railroad corporation to use all reasonable care and prudence for the safety of employés, by providing them with machinery reasonable, safe and suitable, but it is
30 their further duty to use such reasonable care and prudence in seeing that the machinery furnished their employés is kept in good order and repair.

"It is contended by the defendant in this case, that the defendant had in its employment at El Paso and Toyah competent persons to inspect and repair its engines whenever it became necessary to do so, and that in such respect the defendant performed its full duty to all persons in its employment, and that if there was any negligence in the performance of their duties, by machinists or mechanics in inspecting and repairing the engine, it was the negligence of a fellow servant, for which the defendant would not be liable. This contention on the part of defendant is not supported by the best authorities. The duty of keeping in proper repair the machinery and other appliances furnished to servants by the defendant cannot be delegated to another servant, so as to exempt the defendant itself from liability caused by the negligent omission of the servant to whom the duty was delegated. The mere fact that the defendant had in its employ a competent car-inspector, mechanic and machinist would not itself exonerate it from liability if the engine step was defective in construction, or not in proper repair; for he was a representative of the defendant and not a fellow-servant of plaintiff in the sense contended by defendant's counsel, and if he failed to exercise due and reasonable care in reference to the inspection of the engine, including the step, and keeping the same in proper repair, then for any negligence or want of reasonable and proper care on his part in that respect, from which injury resulted to plaintiff, the defendant would be liable.

"In this immediate connection your attention is directed to another principle of law touching the duty of plaintiff:
31 "He was bound to exercise reasonable and ordinary care to avoid injuries to himself; and if the engine step, at the time he was hurt, was defective and he knew, or might have known by ordinary care and attention its condition, and then exposed himself to danger; in other words, using the language of the Supreme Court, 'If he did not use his senses as men generally use theirs to keep from harm,' he cannot complain of the injury from which he suffered; but the principle of the law as to the duty of plaintiff, under such circumstances, is subject to the qualification that he was not required to inspect the engine to ascertain whether or not there was latent or hidden imperfections or defects in or about it (if there were any defects at all) which render its use more hazardous. That was a duty of defendant, the general principle of the law being, that 'unless the defects are such to be obvious, open to common ob-

servation, to any one giving attention to the duties of the occasion, the employé has the right to assume that the employer has performed his duty with respect to the implements and machinery furnished.

"If the defendant performed its duty by using all reasonable care and prudence for the plaintiff's safety, by providing him with machinery reasonably safe and suitable for his use; and if, further, the defendant had in its employment competent inspectors and machinists, whose duty it was to inspect engine No. 90, and make thereon all necessary repairs, and if such inspectors and machinists used reasonable care and diligence in the performance of their duties, and made all such repairs as they could have discovered to be necessary by the exercise of reasonable care and diligence, then for any injuries received by the plaintiff on account of defects in the appliances, which had not been observed by the inspectors and
32 machinists, the defendant would not be liable, and the plaintiff in that event could not recover.

"Bearing in mind the foregoing directions, you will inquire whether the step of the engine at the time the plaintiff was hurt was in good order and repair. If it was, then it would be your duty to return a verdict in favor of the defendant. If, however, the engine step, (and I mean by the use of the word 'step' to include the rod or shaft, the nut and the flat piece of metal attached to the lower end of the rod), was defective and unsafe, and the defendant knew of its defective and unsafe condition, or could have discovered it by the exercise of reasonable care and diligence, and the plaintiff was ignorant of the defect, and could not have ascertained it by the exercise of ordinary care and caution, and if the injuries to the plaintiff resulted from such unsafe and defective condition of the step,—that is to say, if, as claimed by the plaintiff, the step turned when he attempted to descend from the engine, and if in consequence thereof, without negligence on his part he was injured, then you will return a verdict in favor of the plaintiff for such amount of actual damages as will compensate him for the injuries he has sustained.

"As before stated to you, the law requires the plaintiff to take due and proper care of himself, and if at the time of the accident he failed to exercise that degree of care and caution which a person of ordinary prudence would have exercised under similar circumstances of the situation, and his injuries resulted from such want of care and caution, then he would not be entitled to recover, and your verdict in that event should be for the defendant.

"The question of negligence of plaintiff on the one hand, and of defendant, its agent and servants, on the other, is a question of fact which is submitted solely to your determination, and one
33 which you will determine for yourselves from a consideration of all the facts and circumstances in evidence.

"If, in view of the evidence and the foregoing instructions, you return a verdict in favor of the plaintiff, you will award him such amount of actual damages as will compensate him for the injuries

he has sustained. In making your estimate of such damages you are authorized to consider:

"1st. The value of the time lost by him during the period in which he was disabled from his injuries to work and labor, taking into consideration the nature of his business and the value of his service in conducting the same.

"2nd. Fair compensation for the mental and physical suffering caused by them.

"3rd. The probable effect of the injury in future upon his health and the use of his injured leg, and his ability to labor and attend to his affairs; and, generally, any reduction of his power and capacity to earn money and purpose the course of life which he might have otherwise *have* done." And to said charge of the court given the jury, the defendant in open court then and there excepted, because said charge failed to instruct the jury that plaintiff would be guilty of contributory negligence in going upon and alighting from said engine while it was in motion until after the proper servants of the defendant had had an opportunity to repair the same after it arrived in the yards at El Paso, as in defendant's special charge above requested; and the court then and there overruled said exceptions to the charge, and the defendant tenders its bill thereof, which is allowed, signed and sealed.

And thereupon the jury retired and after considering returned a verdict, which is copied in the judgment in this case, and thereupon the court rendered judgment against the defendant,
34 and thereafter the defendant moved the court on the ground stated in its motion for a new trial, contained in this record herein, to set aside said judgment and the said motion was overruled, and now tenders this, its bill of exceptions hereinbefore fully stated and asks that the same be allowed by the court, and filed as a part of the record in this case.

EDWARDS & EDWARDS,
Attorneys for Defendant, Texas & Pacific R'y Co.

Signed this 30th day of Oct., A. D. 1893.

T. S. MAXEY, *Judge.*

Indorsed: No. 173. In U. S. cir't c't, El Paso *vs.* Tex. & Pac. R'w'y Co. Defendant's bill of exceptions. Filed this 30th day of Oct., 1893. D. H. Hart, clerk, by Warner A. Gibbs, deputy.

Assignments of Error.

In the Circuit Court of the United States for the Western District of Texas, at El Paso.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

Now comes the defendant, The Texas & Pacific Railway Company, by the counsel and says, that in the records and proceedings in the above-entitled cause, there is manifest error in this, viz:

First. The trial court erred in refusing to give the jury defendant's special instructions as follows to wit: "If plaintiff was a fireman upon one of defendant's engines engaged in pulling
35 passenger trains over the track into El Paso, where the defendant had repair shops, and competent persons to repair its engines, and plaintiff knew this, and on that day that he was injured, the engine on which he was employed as fireman arrived in El Paso, in apparently good condition, and plaintiff left said engine, and it was taken charge — by servants of the defendant, whose duty it was to inspect and repair it, and he knew he would have ample opportunity afforded him after the same was inspected and repaired to perform his duties upon said engine in *his in* cleaning the *the* same, and having the appliances and implements pertaining to said engine in his immediate charge, in proper condition for his outgoing trip on said engine, it was his duty to give servants of the defendant opportunity to inspect and repair the engine and appliances before going on said engine while it was in motion, and if he did not do this but went on the engine knowing the same had not yet been inspected and repaired, for the purpose of performing his duties in cleaning and putting in proper condition the lubricators, oil cans, and other apparatus which it was his duty to clean and prepare, and in doing so attempted to alight from said engine while it was in motion, when such alighting was not necessary in the performance of such duties, and the step of the engine was in such defective condition that it was unsafe for use in getting off of the engine while in motion and in so alighting he was injured by reason of unsafe step, he would be guilty of contributory negligence and not entitled to recover any damages from defendant even if in alighting he did so in such a manner as a prudent man would exercise if the step were safe," because the proof showed that the plaintiff unnecessarily went on the engine, and alighted therefrom while it was in motion at a time when he knew it had not yet been inspected and repaired, and thus caused the injuries he re-
36 ceived by his own negligence and therefore defendant would not be liable therefor.

Second. The trial court erred in not granting defendant's motion for new trial, and setting aside the verdict and granting a new trial as under the evidence the verdict of the jury is greatly excessive. Wherefor the Texas and Pacific Railway Company prays that the judgment rendered against it by the United States circuit court for the western district of Texas, be reversed and remanded for a new trial.

EDWARDS & EDWARDS,
Attorneys for Defendant, Texas & Pacific Railway Company.

Endorsed: No. 173. In the circuit court of the United States for the western district of Texas, at El Paso. E. M. Patton *vs.* Texas & Pacific Railway Company. Filed this 30th day of October, 1893. D. H. Hart, clerk. Warner A. Gibbs, deputy.

Petition for Writ of Error.

In the United States Circuit Court for the Western District of Texas, at El Paso.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

To the judges of the circuit court of the United States in and for the western district of Texas, at El Paso, October term, 1893:

Your petitioner the Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an Act of the Congress of the United States, respectfully represents—

37 That in said term of this court, the plaintiff, E. M. Patton, recovered against petitioner a judgment in the sum of nine thousand dollars, besides costs of suit, in the proceedings for the recovery of which, and in the rendition of said judgment there was and is error to the great prejudice and damage of petitioner.

Petitioner represents that plaintiff E. M. Patton, and his attorneys of record Millard Patterson and T. A. Falvey reside in said county of El Paso, State of Texas.

Petitioner represents furthermore that it has filed in this court its assignments of errors and here presents the same for the inspection of the court. It prays after inspection thereof that it be granted a writ of error to remand said judgment and proceedings had in said cause, to the United States circuit court of appeals for the fifth circuit, where future repairs are fixed to be held in the city of New Orleans, State of Louisiana, for revision and reversal, and in duty bound will ever pray, etc.

EDWARDS & EDWARDS,
Attorneys for Petitioner.

Granted this 30th October, A. D. 1893.

T. S. MAXEY, *Judge.*

Indorsed: No. 173. E. M. Patton *vs.* The Texas & Pacific Railway Co. Petition for writ of error. Filed this 30th day of October, 1893. D. H. Hart, clerk, by Warner A. Gibbs, deputy.

Writ of Error Bond.

In the United States Circuit Court for the Western District of Texas.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY CO. } No. 173.

38 Know all men by these presents, that we, The Texas & Pacific Railway Company, a corporation duly incorporated by, and organized under an act of the Congress of the United States,

as principal, and, (signed) C. R. Morehead, Joseph Magoffin, as sureties, *and* held and firmly bound unto E. M. Patton, in the full and just sum of twelve thousand dollars, to be paid to said E. M. Patton, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seal using scrawls, and dated this 30th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at a term of the circuit court of the United States, for the western district of Texas at El Paso, in a suit pending in said court between E. M. Patton plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 173 on the docket of the said court, a judgment was rendered against the said Texas & Pacific Railway Company on the 10th day of October, 1893, that the plaintiff by his suit recover of the defendant the sum of nine thousand dollars, with six per cent. per annum interest from October 10, 1893, as well as all costs of suit, and the Texas & Pacific Railway Company having obtained a writ of error and filed a copy thereof in the office of the clerk of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said E. M. Patton, and his attorneys of record, Millard Patterson and T. A. Falvey, citing and admonishing him to be and appear at the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the 30th day of October, A. D. 1893.

Now, the condition of the above obligation is such: That if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to
39 make its plea good, then the above obligation to be void, else remain in full force and virtue.

(Signed) THE TEXAS & PACIFIC RAILWAY COMPANY,
By PEYTON F. EDWARDS,
Attorney and Agent for said Company. [SEAL.]
C. R. MOREHEAD. [SEAL.]
JOSEPH MAGOFFIN. [SEAL.]

Sealed and delivered in the presence of—

J. C. LACKLAND.
J. H. RUSSELL.

Approved this 30th day of October, A. D. 1893.

T. S. MAXEY, *Judge.*

Indorsed: N. 173. Circuit court of U. S., at El Paso. E. M. Patton *vs.* Texas & Pacific Rw. Co. Writ of error bond. Filed this 30th day of Oct., 1893. D. H. Hart, clerk, by Warner A. Gibbs, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between E. M. Patton, plaintiff, and The Texas & Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said Texas & Pacific Railway Company, as by its complaint appears, we, being willing that
40 error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at the city of New Orleans, Louisiana, within 30 days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, this 30th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

D. H. HART,
Clerk of the Circuit Court W. D. T.,
By WARNER A. GIBBS, *Deputy.*

Allowed this 30th day of October, A. D. 1893.

T. S. MAXEY, *Judge.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to E. M. Patton, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at the city of New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western
41 district of Texas, at El Paso, wherein The Texas & Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 30th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

Signed 30th Oct., 1893.

[SEAL.] T. S. MAXEY, *Judge.*

We acknowledge service of the foregoing citation, this the 30th day of October, A. D. 1893, at El Paso, Texas.

MILLARD PATTERSON,
Attorney for E. M. Patton, Defendant and Respondent.

E. M. PATTON
vs.
TEXAS & PACIFIC R'W'Y CO. } No. 173.

Texas & Pacific Railway Company to D. H. Hart, clerk U. S. courts, W. D. T., Dr.

For services rendered as follows:

1893.				
May	1.	Filing entry transcript from dist. court, El Paso Co.	$	25
Sept.	30.	Filing entry original answer		25
Oct.	6.	" 1 "am." original answer		25
Oct.	6.	" deposition A. Stiner		25
"	10.	" charge requested by defense refused.		25
"	10.	" charge requested by defense given		25
"	10.	" charge of court		25
"	10.	Making copy for jury panel for counsel 2, 1 for each .15		30
"	10.	Filing same, 2, .10		20
42				
Oct.	10.	" entry judgment .25, entry minutes, 2 fol. .15, .30		55
"	12.	Filing entry motion for new trial .25 and docket $1, order .15	1	40
"	14.	Filing entry order 15 days' time .25, minutes .15		40
"	14.	" order as to exception of defense for refusal charge		25
"	14.	Entry thereof minutes, 1 fol.		15
"	14.	Filing entry order 10 days' time, &c., .25, entry minutes .15		40
"	30.	Filing entry petition for writ of error		25
"	30.	" writ of error		25
"	30.	" " bond		25
"	30.	" assignment of error		25
"	30.	Issuing citation in error $1, and return .25	1	25
"	30.	Filing entry bill of exceptions		25
"	30.	Copy citation .30, cert. .15 and seal .20 for clerk's office		65
"	30.	Endorsing same .15, filing entry thereof .25		40

Oct.	30.	Same charges as to writ of error, .30, 35, .15, .25..	$1 05
"	30.	Docket for jury trial	3 00
"	30.	Copy bill of costs, 3 fol. .30, cert. .15, and seal .20.	65
"	30.	Same for filing with papers in cause	55
"	30.	Filing entry notary's bill for depositions	25
"	30.	Swearing 6 witnesses upon trial.....	60
"	30.	Transcript to C. C. of appeals, 18,000 words, $18; cert. .15, and seal .20.....	18 35
		Clerk's costs	$33 50

Summary.

Clerk district court El Paso county		$14 15
" U. S. circuit court, W. D. Texas.....		33 50
Attorney's fees—docket fee.....	$20 00	
Reading and deposition...	2 50	
		22 50
Notary's fees—deposition Steiner		4 05
Total		$74 20

43&44 UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk U. S. circuit court in and for the district aforesaid do hereby certify that the foregoing is a true and correct bill of the costs incurred by the parties to the above styled and numbered cause.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said circuit court at office in the city of El Paso, Texas, this 11th day of November, A. D. 1893.

[SEAL.] D. H. HART, *Clerk*,
By WARNER A. GIBBS, *Deputy*.

Clerk's Certificate.

I, D. H. Hart, clerk of the circuit court of the United States in the fifth circuit and western district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record in cause No. 173, wherein E. M. Patton is plaintiff and The Texas & Pacific Railway Company is defendant, except that the original citation in and writ of error are included therein instead of the copies thereof, as fully as the same remains on file and of record in my office at El Paso, Texas.

Witness my hand officially and the seal of said court, at El Paso, Texas, this 11th day of November, 1893.

[SEAL.] D. H. HART, *Clerk*,
By WARNER A. GIBBS, *Deputy*.

45 *Extract from the Minutes.*

November Term, 1893. Tuesday, January 9, 1894.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
E. M. PATTON, Defendant in Error.

This cause came on to be heard this day, and, after argument by Mr. T. J. Freeman, for plaintiff in error, and by Mr. Millard Patterson, for defendant in error, submitted for consideration of the court.

Extract from the Minutes.

November Term, 1893. Tuesday, April 10, 1894.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
E. M. PATTON, Defendant in Error.

This cause came on to be heard on the transcript of the record from the circuit — of the United States for the western district
46 of Texas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the decree of said circuit court in this cause be, and the same is hereby, reversed, and this cause remanded to said circuit court for further proceedings in accordance with the views expressed in the opinion rendered by this court.

It is further adjudged that E. M. Patton be condemned to pay the costs of this cause in this court, for which execution may issue out of said circuit court.

And afterwards, to wit, on the 23rd day of April, 1894, a petition for rehearing was filed in said cause in the words and figures following, to wit:

47 In the United States Circuit Court of Appeals, Fifth Circuit, November Term, 1893.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
E. M. PATTON, Defendant in Error. } No. 204.

Error to the United States circuit court for western district of Texas.

Petition for a Rehearing.

To the honorable U. S. circuit court of appeals for the fifth circuit:

Now comes E. M. Patton, the defendant in error in the above-styled cause, by his attorney and respectfully presents this,
48 his petition and motion for a rehearing in said cause, and he asks the court to set aside and hold for naught its opinion

and judgment heretofore rendered in said cause and grant him a rehearing in the same for the following reasons:

First.

This court erred in determining that the assignment of error urged by plaintiff in error was sufficient to bring before this court the question of the sufficiency of the evidence adduced upon the trial in the circuit court to support the verdict of the jury. Said assignment of error is based wholly upon the refusal of the circuit court to give a special charge in which plaintiff in error sought to have the circuit court declare as a matter of law that certain facts should be considered as establishing contributory negligence on the part of the plaintiff below, and said special charge shows upon its face that it was asked for the reason that in the judgment of the counsel for the defendant below, the evidence was sufficient to authorize a finding against defendant upon the issue of negligence, and as the special charge asked was based wholly upon the contention that there was "contributory negligence," that necessarily presupposed and was a confession that there was actionable negligence upon the part of defendant below, to which plaintiff below contributed.

Authorities.

49 The following is the definition of "contributory negligence" as given in the Am. and Eng. Encyclopedia of Law, vol. 4, p. 17, 18:

"Contributory negligence is the want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. There can be no contributory negligence on the part of a plaintiff except in cases where there has been negligence upon the part of defendant.

In support of this definition the work mentioned cites Patterson's Railway Accident Law, p. 48, sec. 47, and Cooley on Torts, p. 674, and Beach on Con. Neg., secs. 3, 7, and various other text books and authorities.

In Kentucky Railroad Co. *vs.* Thomas, 78 Ky., p. 160, (same case 1 Am. & Eng. R. R. Cas., p. 81) the supreme court of Kentucky says "contributory negligence is a defence which confesses and avoids the plaintiff's case and must be made out by showing affirmatively, not only that the plaintiff was guilty of negligence, but that such negligence co-operated with the negligence of the defendant to produce the injury."

Second.

This court erred in holding that the evidence adduced was
50 not sufficient in said cause to sustain the judgment of the circuit court, and in holding that "there was direct proof by the machinist at Toyah that the nut on the step was not moved while the engine was at Toyah on the trip mentioned in the evi-

dence," and in holding "that there is no evidence tending to prove that up to the time of the arrival of the engine in El Paso, from Toyah the step was not all right," and in holding that the evidence as set forth in the bill of exceptions was not sufficient to support the verdict.

Statement.

There was no evidence whatever from the machinist at Toyah. Alex. Mitchell, who testified, was not the machinist at Toyah, but was the foreman of the shops and yards at Toyah, and he testifies that Mr. Young was the machinist at Toyah at the time the engine was taken into the round-house there, and that it was Sunday and he, Mitchell, believing that he was competent to do so, undertook to make the repairs needed on the engine, which, as reported by the engineer were "to change water, grind in blower, put gasket in front joint of blower pipe and raise the pilot." That to raise the pilot (cow-catcher) required him, Mitchell, to jack up the engine and put gibs under the spring end of the engine truck, and that as he found that he could not accomplish the task of raising the pilot after he had jacked up the front part of the engine, and as he had only the help of two Chinamen he did not raise the pilot.
51 That the two Chinamen placed two jackscrews, one on each side of the front of the engine and elevated the *the* front, that then the Chinamen brought another jackscrew and put it down at the rear of the engine near to the right step on the right side of the engine, that is near to the step which the evidence shows was loose at the time of the accident. That to put the latter jackscrew in place to elevate the rear of the engine it was necessary to remove this step. That he, Mitchell, told the Chinamen to get the jackscrews and under his direction they placed two jackscrews one on each side of the front of the engine, but without any instructions from him they brought and placed another jackscrew on the ground near the step. That he, Mitchell, was out of the round-house for five or ten minutes while the Chinamen were there. And he, Mitchell, then proceeds to state, although he was absent by his own confession five or ten minutes, that the jackscrew near the step was not placed under the engine to elevate it and that the step was not moved for the purpose of putting the jackscrew there, and that the nut on the step was not moved while the engine was at Toyah on that trip. (See paragraph 8, bill of exceptions, Tr. pp. 19, 20.)

The step or loop which was on the tender was on the left side of Patton or the engineer, or any one else getting out of the gangway backwards alighting in the proper way from the engine, and
52 this loop was about six inches higher than the step which was loose, and naturally in alighting from the engine a man would place his left foot in the loop and would very seldom use the step on the right side at all in the mere act of stepping off or on the engine. And as the step projected directly toward the outside and away from the engine a man might step onto or off of the engine without ever detecting that it was loose, and the only way

in which the fact that it was loose could have been ascertained was by an "inspection" of it or by pressure being brought to bear laterally upon it. (See paragraph 6, bill of exceptions, Trans p. 18.)

It was just as much the business of the machinist at Toyah to inspect the engine there as it was the business of the machinist at El Paso to inspect the engine there. (See bill of exceptions, 3rd paragraph, Trans. p. 17, and paragraph 13, bill of exceptions, Trans. p. 23.) And it was just as much the duty of the company to inspect the engine at Toyah before its return as it was the duty of the company to inspect the engine at El Paso. (See bill of exceptions, paragraph 12, Trans. pp. 22, 23.) There is no testimony whatever that the machinist whose business it was to inspect the engine at Toyah after the run of a 196 miles from El Paso ever inspected it at all, and there is no testimony whatever that anybody ever inspected it at Toyah. (See entire evidence in bill of exceptions.)

53 It was at no time and nowhere admitted in the case, and there is nothing whatever in the bill of exceptions to indicate that the foreman, Mitchell, and the other employees of the railroad company (defendant below) at Toyah, were either competent or made any effort to discharge their duty; on the contrary it is shown positively by Mitchell's own testimony that he was incompetent and an unfit man for the place he held. (See paragraph 8, bill of exceptions, Trans. p. 19.) He himself testifies that he was trying to perform the machinist's duty because he believed he could do it, and that he gave up the work and failed to do the most important thing the engineer had directed to be done, viz: to raise the pilot (cow-catcher). He says the engineer had reported and directed that it was necessary that the pilot should be raised, but that he, Mitchell, concluded on account of the fact that he had only two Chinamen to help him, that the engine was all right and he would let it go. And this same witness attempts to testify positively as to what the Chinamen did not do, and as to what was not done about the nut or the step-rod while he was absent as he says "five or ten minutes." There is no intimation in the record as we have said, that the Chinamen or any employee at Toyah who had anything to do with the engine was either competent or attentive to his duty.

The step turned because of the pressure of Patton's right foot as he let go with his left hand and left foot and threw his weight upon it in order that he might swing himself off of the

54 engine, as the engine was moving backwards. (See paragraph 10, bill of exceptions, Trans. p. 22.) And it turned because the nut on the top of the casting was not taut and the rod to which the step was attached had become loose so that it could be easily turned. (See paragraph 12, bill of exceptions, Trans. p. 22.)

Patton did not know that the step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured, and he alighted from the engine in a careful and prudent manner and in the usual manner and if the step had not been loose *their* was no danger in the manner in which Patton

alighted from the engine. (See par. 15, bill of exceptions, Trans. p. 23 and 24.) And as this court has found and the bill of exceptions clearly shows Patton was in the discharge of his duty and properly discharging his duty, at the time the accident happened. (See par. 5, bill of exceptions, p. 17 and 18.)

The testimony showed that the machinist, Rossiter, and Patton properly screwed on the nut and fastened the step after repairs at El Paso before the trip to Toyah, and that the step would not have become loose in a trip from El Paso to Toyah and return. (See par. 7, bill of exceptions, p. 19.) And all of the witnesses who testified about the matter testified that the nut used to tighten the step would not probably work loose in making the trip from
55 El Paso to Toyah and back by the jar and running of the engine. (See par. 18, bill of exceptions, p. 25.) The uncontradicted testimony of Patton showed that the step struck nothing in running the trip from El Paso to Toyah and return, and in the bill of exceptions it is stated, as proven, that the nut and threads of the step-rod were in good condition and had not worked loose since the accident to plaintiff. (See par. 18, bill of exceptions, Trans. p. 25.)

Authorities.

Before citing our authorities which we maintain with all due respect to this court are entirely at variance with the conclusions of this court, we desire to suggest that in the light of the evidence it was a natural impossibility for the step to have become loose without the application of some physical force, brought to bear upon the threads of the nut or the threads of the step-rod which fasten or should have fastened and held the step-rod securely. This court will take judicial knowledge of the fact that a screw or a nut turns from left to right, and if we locate the step, the step-rod, the nut, the engine, the tender and Patton correctly, we must see that it would have been utterly impossible for the step to have turned toward the right and thrown Patton's leg under the driving wheel which was only a few inches to Patton's right in front of the step, unless the step had already been turned at least once,
56 a full revolution, that is at least once all the way around from right to left. Unless the rod and the step had already been turned all the way around at least once or the nut had been turned so as to allow a revolution, any pressure of Patton's right foot upon the step as he was standing would only have made the step tighter, if possible. And in this connection we trust this court will pardon us for also suggesting that with the living witnesses upon the stand and all the facts stated with every little incident which would develop itself in the testimony, the court below and the attorney for the plaintiff in error would be in a better position to pass upon the different phases of the evidence than would this court with nothing but the record before it. We say this in view of the fact that the court below was very careful to submit to the jury every question of fact called for by any of the cases, decided by the Supreme Court of the United States and in view of the fact

that the attorney for the plaintiff in error has not seen fit to urge any proposition or any assignment of error to the effect that the verdict was not supported by or was contrary to the evidence, and in view of the fact that the special charge which was asked by the attorney for the plaintiff in error, which constitutes the basis of his only assignment of error shows upon its face that it was urged not upon the theory that the plaintiff below had failed to establish negligence upon the part of the defendant below, but upon
57 the theory that the plaintiff below was guilty of "contributory" negligence as a matter of law in not waiting until all proper repairs were made to the engine before doing the work which he, the plaintiff below did do.

We call attention to the following cases as peculiarly applicable in arriving at a proper conclusion in the case before this court.

Annie Hough *vs.* Texas & Pacific R'y Co. 100 (U. S.,) p. 213 to 226.

Northern Pacific R'y Co. *vs.* Herbert, 116 U. S. Rep., p. 642 to 660.

Washington & G. E. R'y Co. *vs.* McDade, 135 U. S., p. 554 to 575.

I. & G. N. R'y Co. *vs.* Hernan, 78 Tex., p. 297.

Texas & Pacific R'y Co. *vs.* R. C. Wisenor, 66 Tex., p. 674.

Railway *vs.* McElyea, 71 Tex., p. 390.

Texas, M. R. Co., *vs.* Whitmore, 58 Tex., 288.

G. H. & S. A. R'y Co. *vs.* Farmer, 73 T., p. 88.

McKinney on Fellow-servants, sec. 32, and a large number of cases cited.

In the first case cited (Hough against the T. & P. R'y Co., 100 U. S. p. 213 to 226) the Supreme Court of the United States has laid down the proposition clearly and unequivocally, that in a case like ours the doctrine of fellow-servant has no application whatever.

The Supreme Court in this case asks: "What are the natural
58 and ordinary risks incident to the work in which the servant engages, or who are to be deemed fellow-servants within the true sense of the rule or upon grounds of public policy?" These are said to be the questions in reference to which much contrariety of opinion exists in the courts of the several States and in the case cited the court proceeds to say that there are well-defined exceptions to the "general doctrine" as stated by Chief Justice Shaw and that one and perhaps the most important of those exceptions arise from the obligation of the master whether a natural person or a corporate body, not to expose the servant when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master, and that it is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation among which is the car-lessness of those at least in the same work or employment with whose habits, conduct and capacity he has in the course of his duties an opportunity to become acquainted and against whose neglect or incompetency he may himself take such precautions as his inclination may suggest. (Patton was not engaged in the same em-

ployment with any person connected with the negligence established in our case.) Continuing the Supreme Court says, "It is
equally implied in the same contract that the master shall
59 supply the physical means and agencies for the conduct of
his business. It is also implied and public policy requires it, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant in legal contemplation is presumed to risk for the obvious reason, that the servant who is to use the instrumentality provided by the master has ordinarily no connection with their purchase in the first place, or with their preservation — maintainance in suitable condition after they have been supplied by the master." Proceeding then to discuss the dangers the servant is presumed to risk, the Supreme Court refers to the doctrine laid down in R. R. Co. *vs.* Fort, 17 Wallace, p. 553, and then says, "A railroad corporation may be controlled by competent, watchful and prudent directors who exercise the greatest caution in the selection of a superintendent under whose supervision and orders its affairs and business in all of its departments are conducted. The latter in turn may observe the same caution in the appointment of subordinates, etc. But the obligation still remains to provide and maintain in suitable condition the machinery and apparatus to be used by its employees, etc."
And it is said that the corporation "in respect of such matters
60 cannot interpose between it and the servant who has been injured without fault on his part the personal responsibility of an agent who in exercising the master's authority has violated the duty he owes as well to the servant as to the corporation." The Supreme Court then says "to guard against misapplication of these principles we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety under all circumstances or the perfection in all of its parts of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employees is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in the keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees."

In the next case cited N. P. Railroad Co. *vs.* Herbert, 116 U. S., p. 642, the matter is made still plainer by the Supreme Court and it is said that "It is settled that it is the duty of the corporation to select and retain servants who are fitted and competent for the service and to furnish sufficient and safe material, machinery or other means by which it is to be performed and to keep them in repair and order. This duty it cannot delegate to a servant so as to exempt it
from liability for injuries caused to another servant by its
61 omission. Indeed no duty required of it for the safety and protection of its servants can be transferred so as to exonerate it from such liability."

"The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers or from defective ma-

chinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him."

In the next case cited W. & G. R. R. Co. *vs.* McDade, 135 U. S., p. 554 and 575, the Supreme Court says that "A corporation like the plaintiff in error, is bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care he is responsible for any injury which may happen through a defect of machinery which was or ought to have been known to him and was unknown to the employee or servant."

The cases we have cited from the supreme court of Texas are a few in which that court has simply shown its disposition to follow in the footsteps of the Supreme Court of the United States. And the whole of the law as embodied in those decisions is formulated thus in G. H. & S. A. R'y Co. *vs.* Farmer. (73 Tex. p. 88.) "For the failure to discharge his immediate duty to his servants the master cannot absolve himself from liability by devolving
62 that duty upon another servant. The servant entrusted with the duty is held to be the representative of the master." This doctrine is identically the same as that laid down in Hough *vs.* T. & P. R. R. Co., 100 U. S., p. 213 to 226, where the Supreme Court of the United States endorsing the opinion in Ford *vs.* R. R. Co., 110 Mass. p. 241, says, "that the right of an engineer to recover damages for injuries caused by the explosion of his engine was disputed upon the ground that the want of repair of the engine was due to the negligence of fellow-servants in the department of repairs." It is said that the ground maintained is utterly untenable, and that the agents are the representatives of the master, and that "the corporation is equally chargeable whether the negligence was in originally failing to provide or in afterwards failing to keep its machinery in safe condition."

Now if we even partially understand these decisions they are to the effect that if the step which was so loose that it could be easily turned and through the looseness of which Patton was injured, became and was loose or was allowed to be loose through any act or the want of any act upon the part of the highest or the humblest servant of the defendant below, then the defendant below was liable. As this court has found the step was thoroughly and securely fastened, so that it could not and would not have worked loose
63 on a trip from El Paso to Toyah and return. We have shown by the evidence, and this court has found that the step must have become loose in the very nature of things by virtue of the application of some manual force to the same. It is simply foolish to suggest to this court or any other court that the step or rod could have been caused to undergo a complete revolution by the falling of a lump of coal or the falling of anything else upon it. Now if any individual high or low, skilled or unskilled Caucasian or Mongolian in the employ of the defendant below moved or tampered with the step in any way and failed to put it back in a safe

condition, the negligence of that individual was the negligence of the defendant company.

We have already called the attention of this court to the fact that the engine was not inspected by any one in the round-house at Toyah, although it was the duty of the railroad company to have it inspected by the machinist there. We have shown that the machinist there did not even undertake to do his duty. We have shown that one Mitchell, whose business was entirely different, "undertook" to repair the engine in some respects and quit because he did not think he had force sufficient to complete the job. We have shown affirmatively out of Mitchell's own mouth that he was incompetent and unreliable and that even after the en-
64 gineer had reported that it was necessary to repair the pilot he Mitchell, did not have the repairs made because he thought the engine would get along without them and it may be remarked that there is nothing about an engine which being out of repair could cause a more serious calamity or a greater loss of life than the pilot. And we have shown that the only statement to overcome the presumption which arises in this case that the two Chinamen supposed that the back part of the engine was to be raised and commenced to take off the step and left it insecure after being told by Mitchell that the back part of the engine should not be raised is the testimony of this man Mitchell as to what was not done when he was away. We respectfully and earnestly urge that this honorable court grant us a rehearing in this cause and that the judgment of our circuit court be affirmed.

MILLARD PATTERSON,
Attorney for E. M. Patton, Defendant in Error.

I hereby certify that the foregoing petition for a rehearing is in my opinion well founded in point of law.

MILLARD PATTERSON,
Attorney and Counsel for E. M. Patton, Defendant in Error.

Filed April 23, 1894.
J. M. McKEE, *Clerk.*

65 (*Extracts from the Minutes.*)

November term, 1893, Tuesday, May 29, 1894.

Ordered, that the petition for rehearing in this cause be, and the same is hereby, refused.

Petition for Writ of Error.

(Filed June 25, 1894.)

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
E. M. PATTON. } No. 204.

To the Honorable Melville W. Fuller, Chief Justice of the
66 Supreme Court of the United States, or any associate justice of the Supreme Court of the United States:

Now comes E. M. Patton, by his attorneys, and complains that in the record of proceedings and also in the rendition of the judgment of the United States court of appeals in the above styled and numbered cause on the tenth day of April, 1894, reversing the judgment of the United States circuit court for the western district of Texas in said cause, manifest error hath intervened to the great damage of the said E. M. Patton.

Your petitioner would state that the circuit court of the United States for the western district of Texas, where this suit was originally tried, obtained jurisdiction, and jurisdiction depended upon the fact that The Texas and Pacific Railway Company, the defendant therein, was a corporation created by act of Congress; that the matter in controversy herein exceeds five thousand dollars, besides costs.

Wherefore he prays for allowance of writ of error, to the end that this cause and the said judgment may be carried to the Supreme Court of the United States for review, and prays for supersedeas of said judgment and such other process as may cause the same to be corrected in said Supreme Court.

(Signed) M. PATTERSON AND
MAX DINKELSPIEL & W. O. HART,
Attorneys for E. M. Patton.

67 Writ of error and supersedeas allowed and bond fixed at one thousand dollars this 25th day of June, 1894.

(Signed) E. D. WHITE,
Associate Justice Supreme Court of the United States.

Endorsed: Filed June 25, 1894. J. M. McKee, clerk.

Assignment of Errors.

(Filed June 25, 1894.)

United States Circuit Court of Appeals for the Fifth Circuit.

68 THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
E. M. PATTON. } No. 204.

Now, on this the 25th day of June, 1894, comes E. M. Patton, by his attorney, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the fifth circuit there is manifest error in this, to wit:

First.

Said United States circuit court of appeals for the fifth circuit having determined that the first and only assignment of error relied upon by the Texas & Pacific Railway Company (which brought the case by writ of error from the U. S. circuit court, W. D. T., to the U. S. circuit court for the fifth circuit, at New Orleans) should not be sustained and *and* that the trial court did not err in refusing the special charge asked, which is copied in said first assignment of error, and there being no assignment of error and no suggestion in the record upon the part of said Texas & Pacific Railway Company raising the question of the sufficiency of the evidence to support the verdict rendered in the trial court and the judgment of the
69 trial court in favor of E. M. Patton, said U. S. circuit court for the fifth circuit erred in considering the question of the sufficiency of the evidence to sustain the verdict in and the judgment of the trial court and erred in reversing and remanding the cause upon a point in no way raised or urged as required by law or by the rules of either said U. S. circuit court of appeals or the Supreme Court, and the judgment of the trial court should have been affirmed.

Second.

The U. S. circuit court of appeals for the fifth circuit erred in determining that the assignment of error urged by the Texas & Pacific Railway Company, plaintiff in error, in said court, was sufficient to bring before it the question of the sufficiency of the evidence adduced upon the trial in the circuit court to support the verdict of the jury. Said assignment of error is based wholly upon the refusal of the circuit court to give a special charge in which plaintiff in error sought to have the circuit court declare, as a matter of law, that certain facts should be considered as establishing contributory negligence on the part of the plaintiff below, and said special charge shows upon its face that it was asked for the reason that in the judgment of the counsel for the defendant below the evidence was sufficient to authorize a finding against defendant upon the issue of negligence,

and as the special charge asked was based wholly upon the contention that there was "contributory negligence" that necessarily
70 presupposed and was a confession that there was actionable negligence upon the part of defendant below; to which plaintiff below contributed.

Third.

The Texas & Pacific Railway Company having pleaded that the contributory negligence of E. M. Patton consisted in his having negligently tried to get off of the engine by which he was injured while it was in motion, and the evidence having established without contradiction and conclusively that it was the duty of Patton to keep the cab of the engine clean, to clean all that portion of the engine above the running board, and to keep the oil cans and lubricators filled with oil, and that there was no rule of the company that prohibited the fireman, Patton, from getting upon the engine for the purpose of filling his oil cans, etc., before it was placed in the round-house, and that there was no rule that specified a particular time when he should do his work, and that the only rule was that he was to have the engine in proper condition to go out when its turn came, and that the fireman could select any time that was most convenient for him to clean the cab, fill the oil cans, etc., and that while the engine was hot and the oil warm it was more convenient and could be done in less time than to wait until the engine was cooled off, and the evidence having shown without contradiction that the weather was getting cool and that Patton had to strain the oil, and that it was altogether more convenient for him
71 to do the work when he was doing it than to wait and do it at another time, and that the manner in which Patton got off the engine was a careful and prudent manner, and that he alighted in a careful and prudent manner and the usual manner to alight from the engine whether in motion or standing still, and that if the step, which was defective and loose, had been in repair there was no danger in the manner in which Patton alighted from the engine, and as under the circumstances and facts of the case as tried the question of contributory negligence was not one of law, but one of fact, to be determined by the jury, and the trial court in its general charge having charged the jury properly respecting the question of contributory negligence, said trial court would have had no authority to give the special charge asked specifying certain acts and declaring that they would constitute contributory negligence, and the circuit court of appeals for the fifth circuit should simply have sustained the action of the trial court in refusing the special charge asked by the Texas & Pacific Railway Company and should have affirmed the judgment of the trial court.

Fourth.

The U. S. circuit court of appeals for the fifth circuit erred, not only in considering the question of the sufficiency of the evidence to sustain the verdict and judgment in the trial court, but in hold-

ing that there was not sufficient evidence to support the ver-
72 dict and in holding that there was direct proof by the machinist at Toyah that the nut on the step was not moved while the engine was at Toyah on the trip mentioned in the evidence, and in holding that there was no evidence tending to prove that up to the time of the arrival of the engine in El Paso from Toyah the step was not all right.

Wherefore the said E. M. Patton prays that the judgment of said circuit court of appeals of the fifth circuit be reversed and that the judgment of said circuit court for the western district of Texas (the trial court) be affirmed and that an order be entered affirming in all things the judgment of said trial court.

(Signed) MAX DINKELSPIEL,
W. O. HART AND
MILLARD PATTERSON,
Attorney- for E. M. Patton, Plaintiff in Error.

Endorsed: Filed June 25, 1894. J. M. McKee, clerk.

73 *Writ of Error Bond.*

(Filed June 26, 1894.)

United States Circuit Court of Appeals for the 5th Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
E. M. PATTON. } No. 204.

Know all men by these presents that we, E. M. Patton, as principal, and Fred. Peters, of the city of New Orleans, State of Louisiana, as surety, are held and firmly bound unto The Texas and Pacific Railway Company in the full and just sum of one thousand dollars, to be paid to the said Texas and Pacific Railway Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a regular term of the United States court
74 in and for the western district of Texas, sitting at El Paso, at the October term, 1893, in a suit pending in said court between E. M. Patton, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said Texas and Pacific Railway Company for the sum of nine thousand ($9,000.00) dollars, besides interest and costs of suit; and

Whereas the said Texas and Pacific Railway Company duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit, which court, on the 10th day of April, 1894, rendered a judgment reversing the said judgment in all particulars; and

Whereas the said E. M. Patton has sued out a writ of error from

the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation directed to the said The Texas and Pacific Railway Company, citing and admonishing it to be and appear at said Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the said E. M. Patton shall prosecute his writ of error and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) E. M. PATTON,
FRED. PETERS,
By W. O. HART.

The foregoing is approved.

(Signed) E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

75 *Affidavit.*

F. Peters, being duly sworn, did depose and say that he resides in the city of New Orleans, and that, all his debts and liabilities being paid, he is well worth the sum of one thousand dollars in property subject and liable to seizure situated in this city.

(Signed) FRED. PETERS.

Sworn to and subscribed before me this June 26th, 1894.

(Signed) W. O. HART,
Notary Public.

Endorsed: Filed June 26th, 1894. J. M. McKee, clerk.

76 *Opinion of the Court.*

(Filed April 10, 1894.)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1893.

TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
E. M. PATTON, Defendant in Error. } No. 204.

Error to the United States circuit court, western district of Texas.

Before McCormick, circuit judge, and Locke and Toulmin, district judges.

MCCORMICK, circuit judge, delivered the opinion of the court:

It appears from the bill of exceptions in this case that the following facts were established by the testimony introduced, to wit:

First. The plaintiff, E. M. Patton, was in the employ of the defendant as fireman on a passenger engine at the time and for some time before the accident heretofore described. His regular work was as a fireman of engine No. 90, which hauls a passenger train

from the city of El Paso to Toyah, Texas, a distance of 196 miles, leaving El Paso at about 2.30 p. m. and arriving at Toyah about 11.30 p. m., and remaining in Toyah the balance of the
77 night and all the next day until about 2 a. m. the morning of the second day, when the engine would return from Toyah to El Paso, hauling a passenger train, arriving in El Paso about 10.30 a. m. on the same day, and again leaving El Paso for Toyah at 2.30 p. m. the next day. The engineer who ran said engine was named A. Steiner.

Second. That it was the duty of the fireman of passenger engines in the employ of defendant to keep the cab of the engine clean and to clean all that portion of the engine above the running board, a board extending from one side of the engine to the center of the boiler, and to keep the oil cans and lubricators filled with oil, and to generally obey orders of the engineer when the train was running.

Third. That the defendant had at El Paso a round-house and repairing shops and a machinist to inspect and repair the engines, and also had at Toyah a round-house and a machinist to inspect and repair its engines, and that engines coming into each place were inspected and repaired before going out again.

Fourth. When defendant's passenger engines arrived at El Paso, including the engine on which plaintiff worked, the engineer and fireman would get off and leave the engine attached to the train at the depot, and the engine would then be taken charge of by the yardsmen, and an employé called the "hostler" would detach the engine from the train and take the same down into the yard to coal it, sand it, and do such other things as were necessary, except repair it, and then place the same in the round-house, where it would be cleaned by the servants other than the fireman in all its parts beneath the running board and inspected by the machinist and repaired, and that the fireman would have ample time
78 after the engine had been placed in the round-house to clean out the cab, wipe off his part of the engine, fill his oil cans and lubricators; then the engine would be taken from the round-house and attached to the train by the yardsman or hostler, where the fireman and engineer would get on the train again to begin their trip, and plaintiff knew all this.

Fifth. There was no rule of the company that prohibited the fireman from getting upon the engine for the purpose of filling his oil cans, etc., before it was placed in the round-house, nor was there any rule that specified a particular time when he should do this work, the only rule being that he was to have his engine in proper condition to go out when its turn came. There was a rule of the company that the engineer and fireman of a passenger train should not be called for duty within after they had come in on a trip.

That the fireman could select any time that was most convenient for him to clean the cab, fill the oil cans, etc., and that while the engine was hot and the oil warm it was more convenient and

could be done in less time than to wait until the engine was cooled off.

Sixth. That passenger engine No. 90 has two steps on the right side; one of these steps is a loop fastened under the tender, and a person getting off the engine backwards would have this step on the left; the other step which would be on his right was attached to the rear part of the engine. This latter step the proof shows was loose. The gangway of the engine is where the tender and engine come together, and there is an opening on each side of the engine; that these steps were used to get on and off the engine. The step which is claimed in this case to be defective is the step which is at-
79 tached to the engine. This step consists of a shovel-shaped piece of iron standing directly out from the engine, firmly fixed to a rod of iron about an inch in diameter and about eighteen inches long, which rod passes up through the iron casting at rear of engine, about six or eight inches thick; a shoulder to this rod fits underneath the casting, and the part passing through above has threads on the upper end, upon which the nut is screwed firmly down on the casting, fastening the rod in the casting so that it will not move. This nut is about two inches square, and the thread on the rod extends 5 or 6 inches, thus making the rod extend above the nut when the nut is properly screwed down, and covering this extension above the nut is a tubular piece of brass arranged for ornament, which sets upon the nut and hides from view that portion of the nut immediately around the threads of the step bar. The step affixed to this bar is about twelve or fourteen inches above the track, and the one affixed to the tender is about six inches higher.

Seventh. On the 29th of November it was necessary to put a spring on the right side of the engine, and in order to do this, this step had to be removed in order to place a jackscrew under the rear of the engine, and in doing this the rod holding the step was taken out of the casting by unscrewing the nut described in paragraph 6, and the step was replaced on that morning at El Paso before the engine started on its run to Toyah. In replacing the step the plaintiff himself assisted the machinist of defendant at El Paso, Rossiter, in tightening up said nut, and said day the engine left El Paso, taking out a passenger train at the usual hour, 2.30 p. m., and made the run to Toyah. The machinist and plain-
tiff testified that the nut was properly screwed on at El Paso,
80 and would not have become loose in a trip from El Paso to Toyah and return.

Eighth. That at Toyah some repairs were made to the engine. Alex. Mitchell, who was foreman of the shops and yards at Toyah, undertook to make repairs himself; that he had a couple of Chinamen assistants, who placed two jackscrews, one on each side of the front of the engine, and elevated the front. Then the Chinamen brought another jackscrew and put it down at the rear of the engine near to this step above described on the right side of engine; that to put the latter jackscrews in place to elevate the rear of the engine it was necessary to remove this step. Plaintiff testified he

saw a jackscrew on the ground near this step. Alex. Mitchell, the foreman for defendant, testified that he told the Chinamen to get the jackscrews, and under his direction they placed two jackscrews, one on each side of the front of the engine, but without any instructions from him they brought and put another jackscrew on the ground near the step; that he was out of the round-house five or ten minutes while the Chinamen were there, and that this jackscrew near the step was not placed under the engine in position to elevate it, and that the step was not moved for the purpose of putting the jackscrews there, and that the nut on the step was not moved while the engine was at Toyah on that trip; that Mr. Young was the machinist at Toyah at that time, and that this was Sunday, the 30th of November, 1892, and he, Mitchel, believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and, finding that he could not accomplish
81 the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cowcatcher; that the report of the engineer in the book at Toyah provided for that purpose, reporting that repairs were necessary on his engine on the 29th day of November, 1892, "was change water, grind in blower, put gasket in front joint of blower pipe, raise the pilot."

That "change water" means to let the water that engine came in on out and put fresh water in. "Grind in blower" is to arrange blower so that the smoke will pass out at the stack instead of coming out at the cab. Witness did this, which is a very small job. "Put gasket in front joint of blower pipe" was a very light job and was done by witness.

That to "raise the pilot" required witness to jack up the engine and put gibs under the spring ends of the engine truck. The engine truck is near the front end of the engine; did not do this because it was a pretty big job, and he was doing the work by himself, with only the help of two Chinamen, and that the engine was all right to run as well as if it had been done, except the pilot was a little low, but it did not interfere with the safe running of the engine.

Ninth. The engine left Toyah at the usual hour of two a. m. on the morning of the first of December, 1892, and arrived at the usual hour at El Paso, 10.30 a. m., and plaintiff and engineer got off the engine several times while it was standing on the right side, and neither of them noticed anything the matter with the step. After they arrived in El Paso, they both left the engine attached to the train at the depot, getting off the
82 engine on this right side, using this step, and went to their homes, and neither noticed anything wrong with the step.

Tenth. A short time after the engine arrived in El Paso the "hostler," or a man whose duty it is to take it, coal it, etc., and put it in the round-house, took charge of it, detached it from train, ran it into the yard, and set it on a transfer track, and left it there

an hour or so, then took it to the coal cars, and left it there for the coal-heavers to coal up, and it remained there an hour or more.

The coal is placed in the tender back of the engine and piled up pretty high, and some of the pieces are a foot or eighteen inches long and six or eight inches wide and very heavy, and one of them falling off the gangway might strike the step. When the hostler went later to get the engine from the coal yards the plaintiff was on the engine. The hostler ran the engine from where it was coaled, and was moving it to the proper position near the sand-house to have the fire cleaned out. It was something near an hour from the time the hostler started to leave the coal yards before he got to the sand-house, as he was detained by switches being closed. The plaintiff was on the engine during this time, cleaning up and filling his cans and lubricators, and as the engine was nearing the place where the fire would be cleaned out, and two firemen cleaners were on the engine also, one of them in the gangway and the other on the front of the engine. The engine was backing and the fire-cleaner on the engine was in the act of showing the hostler, by making a signal, where to stop the engine and to clean out the fire.

The engine at this time was moving very slowly, not more than three or four miles an hour, and the plaintiff had gotten off the gang-
83 way and was standing on the steps with his face to the engine, and his left foot on the tender, and his right foot on the step, which is heretofore described as attached by a rod to the rear of the engine, and the plaintiff desiring to get out of the way of the fire-cleaners as the engine passed the sand-house, and for the purpose of stopping there and waiting until the fire was cleaned out, stepped off the engine in a careful and proper manner—that is, detaching his left hand and foot and stepping down with his left foot, which was in the direction the engine was backing, the pressure of his right foot turned the rod to which the step was attached in such a manner as to throw the step around close to the rear driving wheel of the engine, and plaintiff's right foot slipped off the step, so that his right foot fell immediately under the driving wheel, and the engine continued to back; the wheel ran over a portion of his foot and crushed it so that amputation became necessary.

Eleventh. Plaintiff knew that there were servants and employés of the defendant for the purpose of inspecting and repairing his engine, and that the opportunity given to do this was when the engine was placed in the round-house at El Paso, and that at the time he fell and was injured the engine was not yet placed in the round-house where it would be inspected and repaired.

Twelfth. The cause of the turning of the step when plaintiff fell was on account of the nut heretofore described on the top of the casting not being taut, but it had become loose, leaving the rod to which the step was attached so it could be easily turned.

It was the duty of the engineer who operates an engine to inspect and report all defects in repairs necessary on his engine in a book kept for that purpose at each place at the end of his run, in this
84 instance at El Paso and at Toyah, and on the day that the plaintiff was injured the engineer entered the following report

at El Paso a few minutes after they arrived, "Pilot raising and wash out engine"—that is, the pilot needed raising and the engine should be washed out—and he did not discover or report that the said step was loose, if it was loose at the time.

13th. The defendant had proper and competent inspectors to inspect and repair engines in the yards at El Paso and Toyah in addition to the inspections made by the engineers, and that at the time plaintiff was hurt the yard inspectors and mechanics had had no opportunity under the routine and custom as to handling, coaling, sanding, cleaning, inspecting, and repairing engines as they arrived in the yards to inspect or repair the engine upon which he was injured, and this plaintiff well knew.

14th. Plaintiff's business in November and December, 1892, was fireman of a locomotive engine, and had been engaged in said business about seven years.

15th. Plaintiff did not know that said step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured; that the manner in which the plaintiff got off the engine backwards was a careful and prudent manner, and that he alighted in a careful and prudent manner and the usual manner to alight from an engine, whether in motion or standing still, and that if said step had been in repair there was no danger in the manner in which plaintiff alighted from the engine.

85 16th. Plaintiff testified that it was the custom of the firemen to go to their engines in the yard before they were put in the round-house and do their work of cleaning such part of the engine as it was their duty to clean and cleaning out and filling the lubricators and filling the oil cans, but on being asked he could not mention the name of any other fireman employed on defendant's passenger engines who did this besides himself. He stated that his reason for doing this work on the engine at that time was that the weather was getting cool and he had to strain his oil, and he would set his cans out in the gangway near the engine so that the warmth would make it easier and quicker work to handle the oil properly, whereas if he had waited until the engine was in the round-house the oil would have been somewhat chilled and more difficult to handle, and that for some time previous he had been going on the engine and doing this work while the engine was in the yard and before it had been placed in the round-house.

17th. Mr. Wheeler, who is sup't of terminal and foreman of the shops in El Paso for defendant; the hostler Taylor, and the machinist Rositer, employés in the defendant's yard and shops in El Paso, testified that plaintiff was the only fireman of a passenger engine that went upon his engine in the yard in El Paso to do his work before his engine had been placed in the round-house, and that they had known him to do so three or four times before the accident.

18th. All the witnesses except the witness A. C. Wheeler, sup't and foreman of defendant, testified that the nut above described used to tighten the step would not probably work loose in making the trip from El Paso to Toyah and back by the ordinary jar and

running of the engine; that it might come loose by the step having struck against something.

86 Wheeler testified that he was a competent machinist, having had experience of twenty years with engines; that the nut might work loose on said trip, but it was impossible to tell whether it would or not. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return. It was proven that the nut and threads of the step-rod were in good condition and had not worked loose since the accident to plaintiff.

19th. The above and foregoing being a statement of all facts in evidence, the defendant, before the jury retired, under the charge of the court, requested the court to give the jury the following instructions:

"If plaintiff was a fireman upon one of the defendant's engines pulling passenger trains over the track into El Paso, where defendant had repair shops and competent persons to repair its engines, and plaintiff knew of this, and on the day that he was injured the engine on which he was employed as fireman arrived in El Paso apparently in good condition, and the plaintiff left said engine, and it was taken in charge of by servants of the defendant whose duty it was to inspect and repair it, and he knew he would have ample time afforded him after the same was inspected and repaired to perform his duties on said engine in cleaning the same and have the appliances and implements pertaining to said engine in his immediate charge in proper condition for his outgoing trip on said engine, it was his duty to give servants of defendant opportunity to inspect and repair the engine and appliances before going on said engine while it was in motion, and if he did not do this, but went on said engine, knowing that the same had not yet been inspected and repaired, for the purpose of performing his duties in cleaning and putting in proper condition the lubricators, oil cans, and other apparatus which it was his duty to clean and prepare, and in doing so attempted to alight from said engine while it was in motion, when such alighting was not necessary in the performance of such duties, and the step of the engine was in such defective condition that it was unsafe for use in getting off the engine while in motion, and in so alighting he was injured by reason of such unsafe step, he would be guility of contributory negligence and not entitled to recover any damages from defendant, even if in alighting he did so in such a careful manner as a prudent man would exercise if the step were unsafe."

87 These special instructions the court refused, and thereupon charged the jury as follows:

"The plaintiff brings suit against the defendant to recover damages for personal injuries, claiming briefly and in effect that while engaged in the services of the defendant and in the performance of his usual and ordinary duties as fireman on passenger engine No. 90 he was seriously injured because of the negligence of defendant in failing to keep the step of the engine in suitable condition and proper repair for use by its employees. Recovery is sought by plaintiff on the ground of alleged negligence on the part of defend-

ant, and, to entitle him to recover, such negligence must be proved as alleged.

"The general principle of law touching the duties of individuals and corporations in supplying machinery or mechanical appliances for their employés are thus stated by the Supreme Court: 'Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés, nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in his duty of precaution and care, he is responsible for any injury which may happen through defect of machinery which was or ought to have been known to him and was unknown to the employé or servant; but if the employé knew of the defect in the machinery from which the injury happened and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use and is entitled to no recovery; and, further, if the employé himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery through the negligence of the employer.' Railroad Co. *vs.* McDade, 135 U. S., p. 570.

"It is only the duty of a railroad corporation to use all reasonable care and prudence for the safety of employés by providing them with machinery reasonably safe and suitable, but it is their further duty to use such reasonable care and prudence in seeing that the machinery furnished their employés is kept in good order and repair.

"It is contended by the defendant in this case that the defendant had in its employment at El Paso and Toyah competent persons to inspect and repair its engines whenever it became necessary to do so, and that in such respect the defendant performed its full duty to all persons in its employment, and that if there was any negligence in the performance of their duties by machinists or mechanics in inspecting and repairing the engine it was the negligence of a fellow-servant, for which the defendant would not be liable.

88 This contention on the part of defendant is not supported by the best authorities. The duty of keeping in proper repair the machinery and other appliances furnished to servants by the defendant cannot be delegated to another servant, so as to exempt the defendant itself from liability caused by the negligent omission of the servant to whom the duty was delegated. The mere fact that the defendant had in its employ a competent car-inspector, mechanic, and machinist would not itself exonerate it from liability if

the engine step was defective in construction or not in proper repair, for he was a representative of the defendant and not a fellow-servant of plaintiff in the sense contended by defendant's counsel, and if he failed to exercise due and reasonable care in reference to the inspection of the engine, including the step, and keeping the same in proper repair, then for any negligence or want of reasonable and proper care on his part in that respect, from which injury resulted to plaintiff, the defendant would be liable.

"In this immediate connection your attention is directed to another principle of law touching the duty of plaintiff:

"He was bound to exercise reasonable and ordinary care to avoid injuries to himself, and if the engine step, at the time he was hurt, was defective and he knew or might have known by ordinary care and attention its condition and then exposed himself to danger—in other words, using the language of the Supreme Court, 'If he did not use his senses as men generally use theirs to keep from harm'—he cannot complain of the injury from which he suffered; but the principle of the law as to the duty of plaintiff under such circumstances is subject to the qualification that he was not required to inspect the engine to ascertain whether or not there was latent or hidden imperfections or defects in or about it (if there were any defects at all) which render its use more hazardous. That was a duty of defendant, the general principle of the law being that 'unless the defects are such to be obvious, open to common observation to any one giving attention to the duties of the occasion, the employé has the right to assume that the employer has performed his duty with respect to the implements and machinery furnished.'

"If the defendant performed its duty by using all reasonable care and prudence for the plaintiff's safety by providing him with machinery reasonably safe and suitable for his use, and if, further, the defendant had in its employment competent inspectors and machinists, whose duty it was to inspect engine No. 90 and make thereon all necessary repairs, and if such inspectors and machinists used reasonable care and diligence in the performance of their duties and made all such repairs as they could have discovered to be necessary by the exercise of reasonable care and diligence, then for any injuries received by the plaintiff on account of defects in the appliances which had not been observed by the inspectors and machinists the defendant would not be liable, and the plaintiff in that event could not recover.

"Bearing in mind the foregoing directions, you will inquire whether the step of the engine at the time the plaintiff was hurt was in good order and repair. If it was, then it would be your duty to return a verdict in favor of the defendant. If, however, the engine step (and I mean by the use of the word 'step' to include the rod or shaft, the nut, and the flat piece of metal attached to the lower end of the rod) was defective and unsafe, and the defendant knew of its defective and unsafe condition or could have discovered it by the exercise of reasonable care and diligence, and the plaintiff was ignorant of the defect and could

89

not have ascertained it by the exercise of ordinary care and caution, and if the injuries to the plaintiff resulted from such unsafe and defective condition of the step—that is to say, if, as claimed by the plaintiff, the step turned when he attempted to descend from the engine, and if in consequence thereof, without negligence on his part, he was injured—then you will return a verdict in favor of the plaintiff for such amount of actual damages as will compensate him for the injuries he has sustained.

"As before stated to you, the law requires the plaintiff to take due and proper care of himself, and if at the time of the accident he failed to exercise that degree of care and caution which a person of ordinary prudence would have exercised under similar circumstances of the situation, and his injuries resulted from such want of care and caution, then he would not be entitled to recover, and your verdict in that event should be for the defendant.

"The question of negligence of plaintiff on the one hand, and of defendant, its agent and servants, on the other, is a question of fact which is submitted solely to your determination, and one which you will determine for yourselves from a consideration of all the facts and circumstances in evidence."

And to said charge of the court given the jury the defendant in open court then and there excepted because said charge failed to instruct the jury that plaintiff would be guilty of contributory negligence in going upon and alighting from said engine while it was in motion, until after the proper servants of the defendant had had an opportunity to repair the same after it arrived in the yards at El Paso, as in defendant's special charge above requested; and the court then and there overruled said exceptions to the charge.

The only error assigned and relied on to reverse the judgment is that the court erred in refusing to give the charge requested by the defendant as shown above. The request for that charge in effect asked the court to direct a verdict for the defendant. The hypothesis as to the proof made in the requested charge only em-
90 braced matter of fact about which there was no dispute, as most clearly appears by the narrative of the proof in the bill of exceptions above set out. The reason given for this charge in the request is that the plaintiff was guilty of contributory negligence. This may not be technically correct, as contributory negligence is generally defined where a definition is attempted in adjudged cases. In Sullivan *v.* Iron Silver Mining Company, the trial judge directed a verdict for the plaintiff, giving a reason for so doing which was held to be unsound, but the judgment was affirmed because the direction was right, though technically erroneous as expressed. 143 U. S., 431.

In Kirby *v.* Estill, the supreme court of Texas, in reference to a similar question presented to them, say: "While the court may not have erred in refusing to give the several special charges in the form they were requested, we think they were sufficient to call the attention of the court to the important matter embraced in them. On the case made by the evidence we think the court should have instructed the jury to return a verdict for the plaintiff." 75 Texas,

484. The charge to the effect that the plaintiff was "not entitled to recover any damages from defendant" may have been a proper charge to give, although the plaintiff was not shown to have been guilty of contributory negligence. Clearly, if there was no proof tending to show negligence on the part of the defendant, the jury should have been instructed that the plaintiff could not recover.

In two cases decided by this court and not yet reported, Railroad *v.* Burke and Railroad *v.* Thomas, we stated at some length
91 our views as to when the question of negligence is one of law for the court. In the case of The Quebec Steamship Company *v.* Merchant, 133 U. S., 375, the Supreme Court reversed the judgment of the lower court because the trial judge refused to direct a verdict for the defendant when the only negligence the evidence tended to prove was that of a fellow-servant.

In Armour *v.* Hahn, 111 U. S., 313, the judgment of the circuit court was reversed on the ground that the demurrers to the evidence should have been sustained as there was no evidence tending to prove any negligence on the part of the master.

In the case now before us the only defect in the machinery that contributed to the injury, suggested by the pleadings or by the proof, was that the step on the right-hand side of the engine, which plaintiff used in carefully alighting from the engine while in motion, backing slowly at the rate of not more than three or four miles an hour, was not tightly fastened. The step was of the customary and proper kind, in no other manner defective. It had been taken off the last time the engine was in the El Paso yards, two days before this injury. It had been put on again and well fastened before the engine was taken out. The plaintiff assisted the machinist, Rossiter, in tightening up the nut, and both the machinist and plaintiff testify that the nut was properly screwed on at El Paso and would not have become loose in a trip from El Paso to Toyah and return. There is direct proof by the machinist at Toyah that the nut on the step was not moved while the engine was at Toyah on that trip. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return.
92 It was proven that the nut and threads of the step-rod were in good condition and had not worked loose since the accident to plaintiff. The day of the accident the engine left Toyah at the usual hour, two a. m., and arrived at El Paso at the usual hour, 10.30 a. m., and plaintiff and the engineer got off the engine on the right side several times while it was standing, and neither of them noticed anything the matter with the step. After they arrived in El Paso they both left the engine attached to the train at the depot, getting off the engine on this right side, using this step, and neither of them noticed anything wrong with the step. There is no evidence tending to prove that up to this instant the step was not all right. On the contrary, all the evidence on that subject tends strongly to prove that up to this instant the step was all right. It may not have been the duty of the fireman to inspect this step, which he was constantly using, on the run from El Paso to Toyah and return, but it was the duty of his engineer, and they were fel-

low-servants. Railroad *v.* Baugh, 149 U. S., 368. The engineer did not report or discover that the step was out of order. If, in fact, it was so at this instant or previously after the plaintiff had assisted the machinist in fixing it all right in the shop at El Paso immediately before beginning the run to Toyah, how could the master know it or have discovered it? The engineer was a competent, skillful, careful servant. The plaintiff had been engaged as fireman of a locomotive engine for seven years, was in the prime of life (34 years of age), was in good health, had not missed a day's work for two or three years. It is fair to presume that he was as conversant with all the features of the engine as a competent engineer.

93 His attention had been specially directed to this step by his assistant, the machinist, to fix it before starting on the last run from El Paso. The fact that he saw a jackscrew on the ground near this step while the engine was at Toyah does not tend to prove that the step was loose at that time or had been moved, but might have served further to call his attention to the step, as he must have known the jackscrew could not well have been used on that part of the engine without first taking off the step, and yet, though using this step several times in alighting from the engine on the run from Toyah to El Paso and alighting from the engine by it when he left the engine at the passenger depot in El Paso, he did not discover any defect in it.

The engine was to wait at El Paso twenty-eight hours before being called to go out on its next regular run. The fireman was not to be called for duty after coming in on one run until called to go out on the next run. The fireman had certain work to do about the engine before it started on its next trip. There was no specified time within the twenty-eight hours in which this work should be done. He went home. The engine was taken charge of by the hostler, with assistants, detached from the train, run into the yard, set on a transfer track, left there an hour or so, then taken to the coal cars, where it remained an hour or more. Here the plaintiff mounted the engine again and was engaged in doing his proper work, preparing it for its next run. After coaling it the hostler ran the engine from where it was coaled, and was moving it to its proper position near the sand-house to have the fire cleaned out.

94 It was nearly an hour from the time the hostler started to leave the coal yards till he got to this point near the sand-house, as he was detained by switches being closed. During this time the plaintiff was engaged at his appropriate work and had nearly completed it as the engine was nearing the place where the fire would be cleaned out. Before the engine came to a stand-still, while it was moving slowly, at a rate of not more than three or four miles an hour, the plaintiff in a careful manner alighted from it to make more room for firemen who were on it to clean out the fire. At this instant the step proved to be loose. On that account the plaintiff lost his footing, the engine, backing, passed over his foot, and he was painfully hurt and permanently disabled.

If this did not result proximately partly from his unnecessarily leaving the engine while in motion, did it not result from the

natural hazards of his employment? By what reasonable or practicable degree of care beyond the care that was used could the defendant have guarded against this accident? It seems to us that to state the case is sufficient to show that the defendant had not been negligent and could not justly be held liable. The exception to the charge of the court and to the refusal of the requested charge having served to bring up in the bill of exceptions a full statement of all the evidence given on the trial, it appears from the face of the record that there was no evidence to sustain the judgment of the circuit court. It is thus manifestly erroneous and must be reversed.

We therefore order that the judgment of the circuit court is reversed and the case remanded for further proceedings in conformity with this opinion.

95 *Dissenting Opinion.*

United States Circuit Court of Appeals, Fifth Circuit.

(Filed April 20, 1894.)

TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
E. M. PATTON, Defendant in Error. } No. 204.

Error to the United States circuit court, western district of Texas.

Before McCormick, circuit judge, and Locke and Toulmin, district judges.

TOULMIN, judge, dissenting:

I am unable to concur in the opinion and judgment of the court in this case, and will state, as briefly as I can, the grounds of my dissent:

The assignments of error presented by the record are that—"First. The trial court erred in refusing to give the jury defendant's special instructions, as follows, to wit: 'If plaintiff was a fireman upon one of defendant's engines engaged in pulling passenger trains over the track into El Paso, where the defendant had repair shops and competent persons to repair its engines, and plaintiff
96 knew this, and on that day that he was injured the engine on which he was employed as fireman arrived in El Paso in apparently good condition and plaintiff left said engine and it was taken charge by servants of the defendant whose duty it was to inspect and repair it, and he knew he would have ample opportunity afforded him after the same was inspected and repaired to perform his duties upon said engine in his cleaning the same, and having the appliances and implements pertaining to said engine in his immediate charge in proper condition for his outgoing trip on said engine, it was his duty to give servants of the defendant opportunity to inspect and repair the engine and appliances before going on said engine while it was in motion, and if he did not do this, but went

on the engine, knowing the same had not yet been inspected and repaired, for the purpose of performing his duties in cleaning and putting in proper condition the lubricators, oil cans, and other apparatus which it was his duty to clean and prepare, and in doing so attempted to alight from said engine while it was in motion, when such alighting was not necessary in the performance of such duties, and the step of the engine was in such defective condition that it was unsafe for use in getting off of the engine while in motion, and in so alighting he was injured by reason of unsafe step, he would be guilty of contributory negligence and not entitled to recover any damages from defendant, even if in alighting he did so in such a manner as a prudent man would exercise if the step was safe;" and,

Second. "The trial court erred in not granting defendant's motion for a new trial and setting aside the verdict and granting a new trial, as under the evidence the verdict of the jury is greatly excessive."

97 As to the second assignment of errors, suffice it to say that it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character. Railroad Company *vs.* Fraloff, 100 U. S., 31; City of Lincoln *vs.* Power, Sup. C't Reporter, vol. 14, p. 38, 151 U. S.; and, in Holder *vs.* U. S., Sup. C't Reporter, vol. 14, p. 2, the Supreme Court said: "It has also been settled by a long line of decisions of this court that the denial of a motion for a new trial cannot be assigned for error." The only assignment of error, then, presented for our consideration, and the only error urged or discussed by counsel for plaintiff in error, was the refusal of the trial court to give the charge hereinabove set out. The request for that charge was, in effect, asking the court to direct a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence. The evidence in reference to which this charge was requested and on which it must have been based is found fully set out in the fifth, tenth, fifteenth, and sixteenth paragraphs of the opinion of the court. In view of this evidence, it cannot be seriously contended that the facts recited in the charge constitute, as a matter of law, contributory negligence on the part of the defendant in error (the plaintiff below). It certainly cannot be said that this evidence would warrant no other conclusion than that he was guilty of negligence which contributed directly to his injury; and it cannot be fairly claimed that no uncertainty as to the existence of contributory negligence arises from this evidence, and that all fair-minded men would honestly draw the same conclusion from it. If it cannot, then the question of con-

98 tributory negligence was one of fact, and should have been submitted to the jury, as was done by the trial court. In Dunlap *vs.* Railroad Co., 130 U. S., 652, the Supreme Court held that it was error not to submit the question of contributory negligence to the jury, when the conclusion did not follow, as a matter of law, that no recovery could be had upon any view which could be properly taken of the evidence tending to establish such negligence;

and, in Railroad Co. *vs.* Powers, 149 U. S., 44, the Supreme Court said that where there was uncertainty as to the existence of contributory negligence, the question is not one of law, but of fact, to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. Gardner *vs.* Michigan Central R. Co., and authorities therein cited, Supreme Court Reporter, vol. 14, p. 140.

The court in its opinion says that "the only error assigned and relied on to reverse the judgment is that the court erred in refusing to give the charge requested by the defendant, as shown above." I do not understand the court to hold that such refusal was error. It intimates that it was not error. But the court finds that the defendant had not been negligent and could not justly be held liable, and says that, as the bill of exceptions presents a full statement of all the evidence given on the trial, it appears therefrom that there was no evidence to sustain the judgment, and it must therefore be reversed. If by this statement the court means to say that the verdict of the jury was not warranted by the evidence, the answer is that the rule is well established that this court, sitting as a court of error, has no authority to set aside the verdict of the jury, even if it does not appear to be justified by the evidence. Rail-
99 road Co. *vs.* Fraloff, *supra;* City of Lincoln *vs.* Powers, *supra;* Shauer *vs.* Alterton, Sup. Crt Rep., vol. 14, p. 442. If, however, the meaning is that the trial court should have instructed the jury to find for the defendant, then the answer is that the court was not requested to give such instruction. If the defendant wished to test by writ of error in this court the sufficiency of the evidence to sustain a verdict for the plaintiff, it should have requested the trial court at the close of the evidence to peremptorily instruct the jury to return a verdict for it. Hartford Life Annuity Ins. Co. *vs.* Unsell, 144 U. S., 439; Village of Alexander *vs.* Stabler, 50 Fed. Rep., 689. It did not do this, and the sufficiency of the evidence cannot be considered here. "In an action at law, brought here by writ of error for review, this is a court for the correction of the errors of the court below solely; it is not a court for the correction of the mistakes of the jury or for the retrial of issues of fact which they have determined with the consent of the litigants. In order to obtain a review of any question by writ of error in this court it must appear that the court below decided that very question, for their can be no review of that which has never been passed upon." "The court below was not requested to decide and did not determine whether or not there was sufficient evidence to warrant a verdict before it was rendered, and hence it could not have committed any error in this regard, and there is nothing here for us to consider." City of Lincoln *vs.* Sun Vapor Street Light Co., 59 Fed., 61; Hartford Life Annuity Ins. Co. *vs.* Unsell, *supra.* In the case last cited it was held that "if, in a case where the evidence warranted a request for a peremptory instruction to find for the defendant, no request for such
100 instruction was made, it cannot be made a ground of reversal that the issues of fact were submitted to the jury." In the

opinion the court said: "The defendant assumed that it (the case) would be submitted to the jury, and asked instructions touching the several points on which it relied. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be a ground of reversal that the issues of fact were submitted to the jury." So with the case here. The defendant assumed that the case would be submitted to the jury, and asked instructions touching the point—plaintiff's contributory negligence—on which it seemed to rely. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be a ground of reversal that the issues of fact were submitted to the jury. If there was no error in the refusal of the court to give the special instruction on the point of contributory negligence asked by the defendant, there is, in my opinion, no ground of reversal presented on the record.

In the general charge of the court the jury were fully and properly instructed in respect to every aspect of the case. The defendant seems to have been satisfied with the charge given. It took no exception to it and does not complain here of it. This court falls into an error when in its opinion it speaks of the exception to the charge of the court. The record shows no exception to the charge given, but the exception was to the omission of the court to charge that the plaintiff was guilty of contributory negligence. If the exception was to the omission of the court to give the peremptory charge in favor of the defendant no error could be assigned on it.

101 The rule is that it is not error for the court to omit to charge the jury on a particular point or in a particular way unless asked to do so at the trial. A party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time. The not giving an instruction may be excepted to, if it was requested, but not otherwise. This has been the rule in the Federal courts since the early case of Smith *vs.* Carrington, 4 Cranch, 62, down to the case of Texas and Pacific R'y Co. *vs.* Volk, decided January 3rd, 1894, Sup. Ct. Rep., vol. 14, 239. "A request for instructions, being necessary to entitle the excepting party to avail himself of an omission to instruct, cannot be presumed, but must affirmatively appear in the bill of exceptions." Texas & Pac. R'y Co. *vs.* Volk, *supra*, and authorities; Mayer *vs.* Duke, 72 Texas, 445; Odom *vs.* Woodward (Texas), 11 Southwest. Rep., 925. The only exception shown by the record and on which error is assigned is the refusal of the court to give the special charge requested by the defendant to the effect that the plaintiff was guilty of contributory negligence, and therefore could not recover. There was no error in such refusal. T. & P. R'y Co. *v.* Burke, 60 Fed., 704; N. O. & N. E. R. R. Co. *v.* Thomas, 60 Fed., 379.

For the reasons stated I dissent.

102 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Texas & Pacific Railway Company, plaintiff in error, and E. M. Patton, defendant in error, a manifest error hath happened, to the great damage of the said defendant in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of July, in the year of our Lord one thousand eight hundred and ninety-four.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

103 United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 102 pages, numbered from 1 to 102, inclusive, contain a true copy of the record, pleas, process, proceedings, opinion and dissenting opinion, and all papers in the case of The Texas and Pacific Railway Company, plaintiff in error, *vs.* E. M. Patton, defendant in error, No. 204, November term, 1893, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 23 day of July, A. D. 1894.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

104 UNITED STATES OF AMERICA, *ss:*

To the Texas & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein E. M. Patton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this sixth day of July, in the year of our Lord one thousand eight hundred and ninety-four.

E. D. WHITE,
Associate Justice of the Supreme Court U. S.

105 Service of the foregoing citation in error is admitted and accepted this the 21st day of July, 1894.

T. J. FREEMAN,
Att'y and Counsel for The Texas & Pacific Railroad Company, Def't in Error.

Endorsed on cover: Case No. 15,655. U. S. circuit court of appeals, fifth circuit. Term No., 771. E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Company. Filed August 4th, 1894.